

## 310 CMR 9.00: WATERWAYS

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9.01: Authority and Purpose

(1) Authority. 310 CMR 9.00 is adopted by the Commissioner of the Department of Environmental Protection (DEP) under the authority of M.G.L. c. 91A, § 18 to establish procedures, criteria, and standards for uniform and coordinated administration of the provisions of M.G.L. c. 91, §§ 1 through 63 and M.G.L. c. 21A, §§ 2, 4, 8 and 14. 310 CMR 9.00 also form part of the Massachusetts Coastal Zone Management (CZM) Program, established by M.G.L. c. 21A, § 4A, and codified at 301 CMR 20.00 and as may be amended hereafter. The interpretation and application of 310 CMR 9.00 shall be consistent with the policies of the CZM Program, 301 CMR 20.05(3), to the maximum extent permissible by law.

## 9.01: continued

(2) Purpose. 310 CMR 9.00 is promulgated by the Department to carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands, as defined in 310 CMR 9.02. The general purposes served by 310 CMR 9.00 are to:

- (a) protect and promote the public's interest in tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the public trust doctrine, as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts;
- (b) preserve and protect the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose;
- (c) protect the public health, safety, and general welfare as it may be affected by any project in tidelands, great ponds, and non-tidal rivers and streams;
- (d) support public and private efforts to revitalize unproductive property along urban waterfronts, in a manner that promotes public use and enjoyment of the water; and
- (e) foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment under Article XCVII of the Massachusetts Constitution.

9.02: Definitions

Abutter means the owner of land which shares, along the water's edge, a common boundary or corner with a project site, as well as the owner of land which lies within 50 feet across a water body from such site. Ownership shall be determined according to the records of the local tax assessors office.

Accessory Use means a use determined to be accessory to a water-dependent use, in accordance with the provisions of 310 CMR 9.12(3).

Aggrieved Person means any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A.

Applicant means any person submitting a license or permit application or other request for action by the Department pursuant to 310 CMR 9.00, and shall include the heirs, assignees, and successors in interest to such person.

Area of Critical Environmental Concern (ACEC) means an area which has been so designated by the Secretary pursuant to 301 CMR 12.00.

Base Flood Elevation means the maximum elevation of flood water, including wave heights if any, which will theoretically result from the statistical 100-year frequency storm. Said elevation shall be determined by reference to the most recently available flood profile data prepared for the municipality within which the work is proposed under the National Flood Insurance Program, currently administered by FEMA; and in accordance with Wetlands Protection Act regulations at 310 CMR 10.57.

Beach Nourishment means the placement of clean sediment, of a grain size compatible with existing beach sediment, on a beach to increase its width and volume for purposes of storm damage prevention, flood control, or public recreation. The seaward edge of the nourished beach shall not be confined by any structure.

Berth means any space wherein a vessel is confined by wet slip, dry stack, float, mooring, or other type of docking facility.

Boatyard means a facility whose function is the construction, repair, or maintenance of boats, which may include provisions for boat storage and docking while awaiting service.

9.02: continued

Boston Waterfront Decision means the decision of the Massachusetts Supreme Judicial Court in Boston Waterfront Development Corporation vs. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979).

Channel means a navigable route for the passage of vessels, established by customary use or under the authority of federal, state, or municipal law.

Coastal Atlas means the volume of maps of the coastal zone at a scale of 1:40,000 prepared as part of the CZM Program and available for public review at CZM offices.

Coastal Beach means unconsolidated sediment subject to wave, tidal, and coastal storm action which forms the gently sloping shore of a body of salt water and including tidal flats. Coastal beaches extend from the low water line landward to the dune line, coastal bank line or the seaward edge of existing man-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.

Coastal Dune means any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

Coastal High Hazard Area means an area subject to high velocity waters, as defined in accordance with FEMA regulations and as designated on a Flood Insurance Rate Map, as issued and as may be revised or amended hereafter by FEMA.

Coastal or Shoreline Engineering Structure means any breakwater, bulkhead, groin, jetty, revetment, seawall, weir, riprap or any other structure which by its design alters wave, tidal, current, ice, or sediment transport processes in order to protect inland or upland structures from the effects of such processes.

Coastal Processes means natural forces which can modify coastal lands and waters through the action of wind, waves, tides, currents, or ice.

Coastal Zone means that area subject to the CZM Program and defined in 301 CMR 20.03 and 20.99.

Commonwealth Tidelands means tidelands held by the Commonwealth, or by its political subdivisions or a quasi-public agency or authority, in trust for the benefit of the public; or tidelands held by a private person by license or grant of the Commonwealth subject to an express or implied condition subsequent that it be used for a public purpose. In applying this definition, the Department shall act in accordance with the following provisions:

- (a) the Department shall presume that tidelands are Commonwealth tidelands if they lie seaward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome only if the Department issues a written determination based upon a final judicial decree concerning the tidelands in question or other conclusive legal documentation establishing that, notwithstanding the *Boston Waterfront* decision of the Supreme Judicial Court, such tidelands are unconditionally free of any proprietary interest in the Commonwealth;
- (b) the Department shall presume that tidelands are not Commonwealth tidelands if they lie landward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome only upon a showing that such tidelands, including but not limited to those in certain portions of the Town of Provincetown, are not held by a private person.

Commissioner means the Commissioner of the Department of Environmental Protection (DEP).

CZM means the Massachusetts Coastal Zone Management Office.

9.02: continued

CZM Program means the Massachusetts Coastal Zone Management Program established pursuant to M.G.L. c. 21A and codified in 301 CMR 20.00, and as may be amended hereafter.

Date of Receipt means the date of delivery to an office, home or usual place of business by mail or hand delivery. The Department will presume that a document is received three business days after it is mailed, certified mail return receipt requested, to the correct address unless good cause is shown otherwise.

DEM means the Department of Environmental Management.

Department means the Department of Environmental Protection (DEP).

Designated Port Area (DPA) means an area that has been so designated by CZM in accordance with 301 CMR 25.00, and as may be amended hereafter.

DPA Master Plan means the component of a municipal harbor plan pertaining to lands and waters of a DPA within the municipality. Such master plan or portion thereof shall take effect under 310 CMR 9.00 only upon written approval by the Secretary in accordance with 301 CMR 23.00 and any associated written guidelines of CZM.

Dredged Material means rocks, bottom sediment, debris, refuse, plant or animal matter, or other materials which are removed by dredging.

Dredged Material Disposal means the discharge of dredged material, the transportation of such material prior to discharge, and the dispersion, deposition, assimilation or biological uptake or accumulation of such material after transportation or discharge.

Dredging means the removal of materials including, but not limited to, rocks, bottom sediments, debris, sand, refuse, plant or animal matter, in any excavating, cleaning, deepening, widening or lengthening, either permanently or temporarily, of any flowed tidelands, rivers, streams, ponds or other waters of the Commonwealth. Dredging shall include improvement dredging, maintenance dredging, excavating and backfilling or other dredging and subsequent refilling.

EIR means Environmental Impact Report as defined in 301 CMR 11.00.

Environmental Monitor means the semi-monthly publication of proposed actions and projects which require MEPA filings with the Secretary pursuant to M.G.L. c. 30, §§ 61 through 62H.

EOEA means the Executive Office of Environmental Affairs.

Facility of Private Tenancy means a facility at which the advantages of use accrue, on either a transient or a permanent basis, to a relatively limited group of specified individuals (*e.g.*, members of a private club, owners of a condominium building) rather than to the public at large (*e.g.*, patrons of a public restaurant, visitors to an aquarium or museum). Such facilities may be water-dependent, accessory to water-dependent, or nonwater-dependent, and may include but are not limited to:

## 9.02: continued

- houses, apartments, condominiums, and other residential units;
- business or professional offices;
- industrial facilities, including but not limited to manufacturing plants and electric power generating stations;
- vehicular ways or parking facilities not open to the public;
- open spaces, pedestrian walkways, or outdoor recreation facilities not open to the public; and
- marina berths for long-term exclusive use.

Facility of Public Accommodation means a facility at which goods or services are made available directly to the transient public on a regular basis, or at which advantages of use are otherwise open on essentially equal terms to the public at large (*e.g.*, patrons of a public restaurant, visitors to an aquarium or museum), rather than restricted to a relatively limited group of specified individuals (*e.g.*, members of a private club, owners of a condominium building). Facilities of public accommodation may be either water-dependent, accessory to water-dependent, or nonwater-dependent, and shall include but are not limited to:

- public restaurants or entertainment facilities;
- theaters, performance halls, art galleries, or other establishments dedicated to public presentation of the fine arts;
- hotels, motels, or other lodging facilities of transient occupancy;
- educational, historical, or other cultural institutions open to the public;
- interior spaces dedicated to the programming of community meetings, informational displays, special recreational events, or other public activities;
- sports or physical fitness facilities open to the public;
- open spaces, pedestrian walkways, or outdoor recreation facilities open to the public;
- retail sales or service facilities;
- ferry terminals, transit stations, and other public transportation facilities;
- marina berths for transient use; and
- vehicular ways open to the public or parking facilities open to the public, including users of facilities of public accommodation.

FEMA means the Federal Emergency Management Agency.

Fill means any unconsolidated material that is confined or expected to remain in place in a waterway, except for: material placed by natural processes not caused by the owner or any predecessor in interest; material placed on a beach for beach nourishment purposes; and dredged material placed below the low water mark for purposes of subaqueous disposal.

Filled Tidelands means former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill.

Final Order means the order of conditions issued pursuant to the Wetlands Protection Act, M.G.L. c. 131, § 40, as the term is defined in 310 CMR 10.02.

Fish means any animal life inhabiting waterways or the land beneath them that is utilized for recreational or commercial purposes, or that is part of the food chain for such animal life.

Flowed Tidelands means present submerged lands and tidal flats which are subject to tidal action.

## 9.02: continued

Great Pond means any pond which contained more than ten acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark. The title to land below the natural low water mark is held by the Commonwealth in trust for the public, subject to any rights which the applicant demonstrates have been granted by the Commonwealth. The Department shall presume that any pond presently larger than ten acres is a Great Pond, unless the applicant presents topographic, historic, or other information demonstrating that the original size of the pond was less than ten acres, prior to any alteration by damming or other human activity.

Harbor Line means any line established by the legislature pursuant to M.G.L. c. 91, § 34.

Harbormaster means the individual appointed pursuant to M.G.L. c. 102, § 19, or as otherwise provided by law.

High Water Mark means:

- (a) for tidelands, the present mean high tide line, as established by the present arithmetic mean of the water heights observed at high tide over a specific 19-year Metonic Cycle (the National Tidal Datum Epoch), and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce; and
- (b) for Great Ponds, rivers, and streams, the present arithmetic mean of high water heights observed over a one year period using the best available data as determined by the Department.

Historic High Water Mark means the high water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding, or other means. In areas where there is evidence of such alteration by fill, the Department shall presume the historic high water mark is the farthest landward former shoreline which can be ascertained with reference to topographic or hydrographic surveys, previous license plans, and other historic maps or charts, which may be supplemented as appropriate by soil logs, photographs, and other documents, written records, or information sources of the type on which reasonable persons are accustomed to rely in the conduct of serious business affairs. Such presumption may be overcome by a clear showing that a seaward migration of such shoreline occurred solely as a result of natural accretion not caused by the owner or any predecessor in interest. For Great Ponds, the historic high water mark is synonymous with the natural high water mark.

Historic Low Water Mark means the low water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding or other means. In areas where there is evidence of such alteration by fill, the Department shall make its determination of the position of the historic low water mark in the same manner as described in 310 CMR 9.02: Historic High Water Mark.

Infrastructure Crossing Facility means any infrastructure facility which is a bridge, tunnel, pipeline, aqueduct, conduit, cable, or wire, including associated piers, bulkheads, culverts, or other vertical support structures, which is located over or under the water and which connects existing or new infrastructure facilities located on the opposite banks of the waterway. Any structure which is operationally related to such crossing facility and requires an adjacent location shall be considered an ancillary facility thereto. Such ancillary facilities generally include, but are not limited to, power transmission substations, gas meter stations, sewage headworks and pumping facilities, toll booths, tunnel ventilation buildings, drainage structures, and approaches, ramps, and interchanges which connect bridges or tunnels to adjacent highways or railroads.

Infrastructure Facility means a facility which produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunication services to the public.

## 9.02: continued

Improvement Dredging means any dredging under a license or a permit in an area which has not been previously dredged or which extends the original dredged width, depth, length, or otherwise alters the original boundaries of a previously dredged area.

Landlocked Tidelands means any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located:

- (a) within 250 feet of the high water mark, or
- (b) within any Designated Port Area. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark.

Licensee means the person to whom a license is issued and shall include the heirs, assignees, and successors in interest to such person.

Low Water Mark means the present mean low tide line, as established by the present arithmetic mean of water heights observed at low tide over a specific 19-year Metonic Cycle (the National Tidal Datum Epoch), and shall be determined using hydrographic survey data of the National Ocean Survey of the U.S. Department of Commerce.

Maintenance Dredging means dredging in accordance with a license or permit in any previously authorized dredged area which does not extend the originally dredged depth, width, or length.

Marina means a berthing area with docking facilities under common ownership or control and with berths for ten or more vessels, including commercial marinas, boat basins, and yacht clubs. A marina may be an independent facility or may be associated with a boatyard.

Marine Industrial Park means a multi-use complex on tidelands within a DPA, at which:

- (a) the predominant use is for water-dependent industrial purposes; in general, at least two thirds of the park site landward of any project shoreline must be used exclusively for such purposes;
- (b) spaces and facilities not dedicated to water-dependent industrial use are available primarily for general industrial purposes; uses that are neither water-dependent nor industrial may occur only in a manner that is incidental to and supportive of the water-dependent industrial uses in the park, and may not include general residential or hotel facilities; and
- (c) any commitment of spaces and facilities to uses other than water-dependent industry is governed by a comprehensive park plan, prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, if applicable, and accepted by the Department in a written determination issued pursuant to 310 CMR 9.14.

MEPA means the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H, and 301 CMR 11.00 and as may be amended hereafter.

MOU means a Memorandum of Understanding between the Department and another public agency. The draft text of any such document or other written interagency agreement shall be published in the Environmental Monitor for public review and comment, and the final text shall be published therein upon adoption and made available by the Department upon request.

Municipal Harbor Plan means a document (in words, maps, illustrations, and other media of communication) setting forth, among other things: a community's objectives, standards, and policies for guiding public and private utilization of land and water bodies within a defined harbor or other waterway planning area; and an implementation program which specifies the legal and institutional arrangements, financial strategies, and other measures that will be taken to achieve the desired sequence, patterns, and characteristics of development and other human activities within the harbor area. Such plan shall take effect under 310 CMR 9.00 only upon written approval by the Secretary, provided that said plan approval is issued in accordance with 301 CMR 23.00 and any associated written guidelines of CZM.

9.02: continued

Municipal Official means the mayor of a city, the board of selectmen of a town, or the council of a municipality having a manager-council form of government.

Natural High Water Mark means the historic high water mark of a Great Pond.

Natural Low Water Mark means the historic low water mark of a Great Pond.

Noncommercial Community Docking Facility means a facility for berthing of recreational vessels accessory to residential or nonprofit seasonal camp use (*e.g.*, summer camps).

Non-Profit Organization means an organization exempt from federal income taxation under § 501(c)(3) of the U.S. Internal Revenue Code, as may be amended hereafter.

Nonwater-dependent Use means a use as specified in 310 CMR 9.12.

Nonwater-dependent Use Project means a project consisting of one or more nonwater-dependent uses, or a mix of water-dependent and nonwater-dependent uses, as specified in 310 CMR 9.12(1).

Notification Date means a specified date by which a public notice must be published in the newspaper and/or the Environmental Monitor, and mailed to municipal officials, and on which the public comment period commences.

Ocean Sanctuary means an ocean area wherein certain restrictions on activities apply, as defined in M.G.L. c. 132A, § 13 and 302 CMR 5.00.

Party means the applicant, any person allowed by the Department to intervene pursuant to M.G.L. c. 30A, § 1, or any ten citizens allowed by the Department to intervene pursuant to M.G.L. c. 30A, § 10A.

Person means any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority.

Present means contemporaneous with the review of an application, request for determination of applicability, or other action by the Department.

Private Recreational Boating Facility means a facility for berthing of recreational vessels at which all berths and accessory uses thereto are not available for patronage by the general public, or where exclusive use of any such berth is available on a long-term basis. Such berths shall not include a berth reserved for the operator of said facility.

Private Tidelands means tidelands held by a private person subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water. In accordance with the Colonial Ordinances of 1641-47, the Department shall presume that tidelands are private tidelands if they lie landward of the historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward; such presumption may be overcome upon a showing that such tidelands, including but not limited to those in certain portions of the Town of Provincetown, are not held by a private person or upon a final judicial decree that such tidelands are not subject to said easement of the public.

Project means any work, action, conduct, alteration, change of use, or other activity subject to the jurisdiction of the Department under M.G.L. c. 91, in accordance with the provisions of 310 CMR 9.03 through 9.05, which is the subject of a license or permit application.

Project Shoreline means the high water mark, or the perimeter of any pier, wharf, or other structure supported by existing piles or to be replaced pursuant to 310 CMR 9.32(1)(a)4., whichever is farther seaward.

Project Site means the area owned, controlled, or proposed for development by the applicant in which a project will occur and which is subject to the geographic jurisdiction of the Department, as specified in 310 CMR 9.04.



9.02: continued

Public Agency means any agency, department, board, district, commission, or authority of the Commonwealth or the United States, or any municipality or other political subdivision of the Commonwealth.

Public Recreational Boating Facility means a facility for berthing of recreational vessels at which all berths and accessory uses thereto are available for patronage by the general public on a seasonal or transient basis. Such facility may be either publicly or privately owned, and may include town piers, commercial rental marinas, or community sailing centers or yacht clubs offering open membership to the public. Nothing in this provision shall be construed as prohibiting the adoption of minimum eligibility criteria of broad, objective applicability, such as basic knowledge of boating safety or a willingness to make regular work commitments; nor as prohibiting the reservation of a berth for the operator of said facility.

Public Service Project means a project:

- (a) whose entire control, development, and operation is undertaken by a public agency for the provision of facilities or services directly to the public (or to another public agency for such provision to the public) by the public agency or its contractor or agent; or
- (b) which consists entirely of infrastructure facilities, as defined herein at 310 CMR 9.02.

Public Way means a road, street, or highway for vehicular use open to the public at large and for which a public agency is responsible for maintenance and repair.

Secretary means the Secretary of the Executive Office of Environmental Affairs.

Shellfish means the following species: Bay Scallop (*Argopecten irradians*); Blue Mussel (*Mytilus edulis*); Ocean Quahog (*Arctica islandica*); Oyster (*Crassostrea virginica*); Quahog (*Mercenaria mercenaria*); Razor Clam (*Ensis directus*); Sea Clam (*Spicula solidissima*); Sea Scallop (*Placopecten magallanicus*); and Soft Clam (*Mya arenaria*).

State Agency means any agency, department, board, district, commission, or authority of the Commonwealth.

Structure means any man-made object which is intended to remain in place in, on, over, or under tidelands, Great Ponds, or other waterways. Structure shall include, but is not limited to, any pier, wharf, dam, seawall, weir, boom, breakwater, bulkhead, riprap, revetment, jetty, piles (including mooring piles), line, groin, road, causeway, culvert, bridge, building, parking lot, cable, pipe, pipeline, conduit, tunnel, wire, or pile-held or other permanently fixed float, barge, vessel or aquaculture gear. Structure does not include any mooring, float, or raft which has been authorized by annual permit of a harbor master, in accordance with M.G.L. c. 91, § 10A and with 310 CMR 9.07; nor any weir, pound net, or fish trap which has been authorized in tidewater by permit of the municipal official and approved by the Department and the Division of Marine Fisheries, in accordance with M.G.L. c. 130, § 29. Any such mooring, float, raft, weir, pound net, or fish trap, which has not been so authorized shall be considered a structure under 310 CMR 9.00.

Substantial Change in Use means a use for a continuous period of at least one year of 10% or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity, whether express or implied.

Substantial Structural Alteration means a change in the dimensions of a principal building or structure which increases by more than 10% the height or ground coverage of the building or structure specified in the authorization or license, or an increase by more than 10% of the surface area of the fill specified in the authorization or license.

Superseding Order means an order of conditions issued by the Department pursuant to the Wetlands Protection Act M.G.L. c. 131, § 40, as the term is defined in 310 CMR 10.02.

## 9.02: continued

Supporting DPA Use means an industrial or commercial use in a Designated Port Area that provides water-dependent industrial use in the DPA with direct economic or operational support, to an extent that adequately compensates for the reduced amount of tidelands on the project site that will be available for water-dependent industrial use during the term of the license. The type, location, scale, duration, operation, and other relevant aspects of the industrial or commercial use must be compatible with activities characteristic of a working waterfront and its backlands, in order to preserve in the long run the predominantly industrial character of the DPA and its viability for maritime development. In determining whether an industrial or commercial use qualifies as a Supporting DPA Use, the Department shall act in accordance with the following provisions as well as all applicable provisions of a DPA Master Plan.

In the case of commercial uses, any use may be determined to be compatible with the DPA except where the inherent nature of the use gives rise to severe conflict with port operations or excessive consumption of port space, either directly or indirectly (*e.g.* as a result of collateral development activity). Accordingly, new or expanded uses that shall not be determined to be a Supporting DPA Use include, but are not limited to, transient group quarters such as hotels/motels, nursing homes, and hospitals; recreational boating facilities; amusement parks and other major entertainment or sports complexes; and new buildings devoted predominantly to office use. Conversely, uses that shall be presumed compatible with the DPA are small business uses that are adaptable to the upper floors of existing buildings, to minor infill parcels, and to other interstitial spaces not likely (in their own right or in combination with other nearby spaces) to be of primary importance in attracting maritime development to the DPA. Typical of such uses are storefront retail and service facilities; shops operated by self-employed traders; eating and drinking establishments with limited seating; and small-scale administrative offices.

Unless otherwise provided in a DPA Master Plan, the amount of filled tidelands occupied by Supporting DPA Uses and any accessory uses thereto shall not exceed 25% of the area of the project site (excluding tidelands seaward of the project shoreline), so that the remainder of the project site will continue to be available exclusively for water-dependent industrial or temporary use. Temporary uses may be licensed only if marketing efforts have failed to identify any prospective water-dependent industrial tenant, and if the license is conditioned to require further solicitation of such tenancy upon expiration of the license term.

Temporary Use means warehousing, trucking, parking, and other industrial and transportation uses which occupy vacant space or facilities in a Designated Port Area, for a maximum term of ten years as specified in 310 CMR 9.15(1)(d), and without significant structural alteration of such space or facilities.

Tidelands means present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands, as defined herein.

Trust Lands means present and former waterways in which the fee simple, any easement, or other proprietary interest is held by the Commonwealth in trust for the benefit of the public. All geographic areas subject to the jurisdiction of M.G.L. c. 91, as specified in 310 CMR 9.04, are generally considered to be trust lands.

Upper Floor Accessory Services means utility and access facilities which must be located on the ground floor of any building to serve any facility of private tenancy located on any other floors, provided that such accessory services do not occupy more than 25% of the building footprint. Examples of such services include utility shafts, elevators, stairways, and entryways.

Water-Dependent Use means a use as specified in these regulations at 310 CMR 9.12(2).

Water-Dependent Use Project means a project consisting entirely of fill or structures for one or more water-dependent or accessory uses as specified in 310 CMR 9.12(1).

## 9.02: continued

Water-Dependent Use Zone means an area within the geographic jurisdiction of the Department and running landward of and parallel to the project shoreline, the width of which is determined in accordance with 310 CMR 9.51(3)(c). For purposes of such determination, the landward lot line of a property shall mean that in existence as of the effective date of 310 CMR 9.00, unless subsequent reconfiguration thereof results in a more landward location at the time of license application; and all baselines and distances shall be specified according to accepted land regulation and survey practices.

Waterway means any area of water and associated submerged land or tidal flat lying below the high water mark of any navigable river or stream, any Great Pond, or any portion of the Atlantic Ocean within the Commonwealth, which is subject to 310 CMR 9.04.

Wetlands Protection Act means M.G.L. c. 131, § 40 and 310 CMR 10.00, as may be amended hereafter.

9.03: Scope of Jurisdiction

(1) Authorization of Projects By the Department. Written authorization in the form of a license, permit, or amendment thereto must be obtained from the Department before the commencement of one or more activities specified in 310 CMR 9.03(2) and (3) or 310 CMR 9.05 and located in one or more geographic areas specified in 310 CMR 9.04, unless the legislature has specifically exempted any such activity(ies) from Department jurisdiction under M.G.L. c. 91.

NON-TEXT PAGE

## 9.03: continued

(2) Oversight of Certain Work Authorized By the Legislature. In accordance with M.G.L. c. 91, § 20, no person shall undertake any work authorized by the legislature and subject to M.G.L. c. 91 in accordance with 310 CMR 9.03(1), until said person has given written notice thereof to the Department, in the form of a license or permit application, and has submitted plans for such work which conform with the application requirements of 310 CMR 9.00. The Department may alter such plans and impose conditions in the license or permit, which shall be consistent with the legislative authorization and issued in accordance with 310 CMR 9.00 310 CMR 9.31(4). All work so authorized shall conform with the plans and conditions contained in said license or permit, and shall not commence until said license or permit has been issued.

In accordance with the *Boston Waterfront* decision of the Supreme Judicial Court, grants by the legislature of tidelands below the historic low water mark are subject to a condition subsequent that such tidelands be used for the public purpose for which they were granted, and the rights of the grantee to those tidelands are ended when that purpose is extinguished. If the present use of such tidelands has changed from the public purpose for which they were granted, authorization shall be obtained from the Department, in the form of a license pursuant to 310 CMR 9.00, in order to establish that such change of use serves a proper public purpose.

(3) Activities of the Massachusetts Port Authority. In accordance with its Enabling Act, St. 1956 c. 465, the Massachusetts Port Authority (Massport) may undertake the following activities within the following geographic areas without written authorization in the form of a license or permit from the Department:

- (a) any project consisting entirely of water-dependent-industrial uses or accessory uses thereto on previously filled or flowed tidelands within the Port of Boston; or
- (b) any project authorized by said Enabling Act on previously filled tidelands within the geographical boundary of Logan Airport, so long as it is operated as an airport.

Except as provided in 310 CMR 9.03(3)(b), Massport shall obtain a license or permit pursuant to M.G.L. c. 91 for any project consisting entirely of uses other than water-dependent-industrial uses. With regard to all other future Massport projects, Massport and the Department shall develop an MOU, which shall be executed by the effective date of 310 CMR 9.00, in order to further clarify the Department's jurisdiction under M.G.L. c. 91 relative to the purposes, powers, and plans of Massport under its Enabling Act.

#### 9.04: Geographic Areas Subject to Jurisdiction

The following geographic areas, generally considered "trust lands", are subject to licensing and permitting by the Department under 310 CMR 9.00:

(1) all waterways, including all flowed tidelands and all submerged lands lying below the high water mark of:

- (a) Great Ponds;
- (b) the Connecticut River;
- (c) the section of the Westfield River in the Towns of West Springfield and Agawam lying between the confluence of said river with the Connecticut River and the bridge across said river at Suffield Street in said Town of Agawam;
- (d) the non-tidal portion of the Merrimack River; and
- (e) any non-tidal river or stream on which public funds have been expended for stream clearance, channel improvement, or any form of flood control or prevention work, either upstream or downstream within the river basin, except for any portion of any such river or stream which is not normally navigable during any season, by any vessel including canoe, kayak, raft, or rowboat; the Department may publish, after opportunity for public review and comment, a list of navigable streams and rivers; and

(2) all filled tidelands, except for landlocked tidelands, and all filled lands lying below the natural high water mark of Great Ponds.

9.05: Activities Subject To Jurisdiction

(1) Activities Requiring a License Application. Except as provided in 310 CMR 9.05(3), an application for license or license amendment shall be submitted to the Department for the following activities involving work on or use of fill or structures:

- (a) any construction, placement, excavation, addition, improvement, maintenance, repair, replacement, reconstruction, demolition or removal of any fill or structures, not previously authorized, or for which a previous grant or license is not presently valid.
- (b) any existing or proposed use of any fill or structures not previously authorized, or for which a previous grant or license is not presently valid;
- (c) any structural alteration of fill or structures from the specifications contained in a valid grant or license, whether such authorization was obtained prior to or after January 1, 1984;
- (d) any change in use of fill or structures from that expressly authorized in a valid grant or license or, if no such use statement was included, from that reasonably determined by the Department to be implicit therein, whether such authorization was obtained prior to or after January 1, 1984.

(2) Activities Requiring a Permit Application. Except as provided in 310 CMR 9.05(3), an application for a permit or permit amendment shall be submitted to the Department for the following activities unless the applicant includes such activities in a license application:

- (a) any beach nourishment;
- (b) any dredging;
- (c) any disposal involving the subaqueous placement of unconsolidated material below the low water mark;
- (d) any burning of rubbish or other material upon the water, in accordance with M.G.L. c. 91, § 52;
- (e) any lowering of the water level of a Great Pond, except a body of water used for agriculture, manufacturing, mercantile, irrigation, insect control purposes, or for flowing cranberry bogs, or for public water supply, in accordance with M.G.L. c. 91, § 19A; and
- (f) any structure and associated use with the potential to impair the public's rights in tidelands which is intended to remain in place on a temporary basis not to exceed six months, provided said structure and use otherwise meet the applicable substantive standards found at 310 CMR 9.31 through 9.60.

(3) Activities Not Requiring a License or Permit. Notwithstanding the provisions of 310 CMR 9.05(1) through (2), no license or permit is required for:

- (a) maintenance, repair, and minor modifications, as described in 310 CMR 9.22, of fill or structures for which a grant or license is presently valid, or which is exempt from licensing pursuant to 310 CMR 9.05(3)(b) through (h);
- (b) continuation of any existing, unauthorized use or structure located on private tidelands lawfully filled in accordance with a license or grant, provided that no unauthorized structural alteration or change in use has occurred on such tidelands subsequent to January 1, 1984 or in violation of an express condition of said license or grant;
- (c) continuation of any existing, unauthorized public service project, provided that no unauthorized structural alteration or change in use has occurred subsequent to January 1, 1984, unless the Department determines, upon notice and opportunity for public comment, that licensing is essential to prevent significant harm to an overriding water-related public interest;
- (d) continuation in use of any unauthorized Massport project existing as of the effective date of 310 CMR 9.00, and for which no unauthorized structural alteration or change of use has occurred since that date, provided said project:
  - 1. includes water-dependent industrial activities; or
  - 2. is any other project for which a final EIR was certified as adequately and properly complying with M.G.L. c. 30, §§ 61 through 62H, prior to January 1, 1984; unless the Department determines, upon written notice and opportunity for public comment, that licensing is essential to prevent significant harm to an overriding water-related public interest;
- (e) continuation in the use of existing, unauthorized water-dependent structures that are accessory to a single-family residence, in accordance with the provisions of 310 CMR 9.28;

## 9.05: continued

- (f) continuation of any existing, unauthorized use of fill or structures constructed prior to 1939 on any non-tidal river or stream subject to jurisdiction under 310 CMR 9.04(1)(e), provided that no unauthorized structural alteration or change in use has occurred subsequent to January 1, 1984;
- (g) placement in a non-tidal river or stream subject to jurisdiction under 310 CMR 9.04(1)(e) of fill or structures for which a final Order of Conditions has been issued under M.G.L. c. 131, § 40 and 310 CMR 10.000, and which does not reduce the space available for navigation; such fill or structures are limited to:
  - 1. overhead wires, conduits, or cables to be attached to an existing bridge, without substantial alteration thereof, or constructed and maintained in accordance with the National Electrical Safety Code;
  - 2. fish ladders, fishways, and other devices which allow or assist fish to pass by a dam or other obstruction in the waterway;
  - 3. pipelines, cables, conduits, sewers, and aqueducts entirely embedded in the soil beneath such river or stream; and
  - 4. bulkheads, revetments, headwalls, storm drainage outfalls, and similar structures which do not extend into such river or stream, except as may be necessary for bank stabilization;
- (h) reconfiguration of licensed docking facilities in a marina, in accordance with the provisions of 310 CMR 9.39(1)(b);
- (i) any change in use of berths for recreational vessels from seasonal or transient occupancy to long-term exclusive occupancy in accordance with a contract or other agreement, provided that the lease agreement, master lease agreement, or notice thereof for such berths was filed at the Registry of Deeds prior to July 6, 1990, in which event no application for a license or license amendment is required for any change in use of any berth subject to such agreement for long-term exclusive occupancy;
- (j) emergency action, in accordance with the provisions of 310 CMR 9.20;
- (k) removal of fill or structures in accordance with the provisions of 310 CMR 9.08 or 310 CMR 9.27; and
- (l) activities subject to annual permit by the harbormaster, other designated local official, or local permitting program, in accordance with the provisions of 310 CMR 9.07.
- (m) demolition or removal of any unauthorized structures or fill in order to facilitate water-dependent use provided prior written approval is obtained from the Department, which, at the discretion of the Department may include prior public notice and comment.

9.06: Requests for Determination of Applicability

- (1) Any person who desires a determination whether 310 CMR 9.00 presently apply to any area of land or water, or any activity thereon, may submit to the Department a request for a determination of applicability. Said request shall:
  - (a) use the appropriate determination of applicability forms provided by the Department;
  - (b) provide a detailed description of the proposed project, if any, which identifies all existing and proposed fill and structures and uses thereof; and
  - (c) include a plan or plans showing:
    - 1. an appropriately-scaled site location map;
    - 2. references to any previous licenses, permits, or other authorizations for existing structures, fill, or dredging at the site, including the license number(s) and the date the license was recorded at the Registry of Deeds or Land Court;
    - 3. appropriately-scaled principal dimensions and elevations of proposed and existing fill, structures, or dredging in waterways;
    - 4. any historic dredging, filling, or impoundment at the site; and
    - 5. a delineation of the present high and low water marks, and the historic high and low water marks, as relevant.
- (2) The applicant shall submit a request for a determination of applicability to the Department, and at the same time, to the persons identified in 310 CMR 9.13(1)(a).
- (3) A public hearing and newspaper notice published by the applicant may be required by the Department on any request for a determination of applicability.

## 9.06: continued

- (4) Any person may submit written comments to the Department on any request for a determination of applicability within 21 days of the date of the request or the newspaper notification date, if applicable.
- (5) Unless the Department requests further information, the Department shall issue a determination of applicability in recordable form within 60 days of the receipt of the request or the close of the public comment period, whichever is later.
- (6) Any person who would otherwise have the right to an adjudicatory hearing pursuant to 310 CMR 9.17 may appeal the issuance of any determination of applicability within 21 days of the date of its issuance in accordance with the procedures set forth at 310 CMR 9.17.

9.07: Activities Subject to Annual Permit

(1) General. A written application for an annual permit must be submitted to the harbormaster of a city or town or, in a municipality where no harbormaster has been appointed, to the municipal official or other designated local official(s), for the placement on a temporary basis of moorings, floats or rafts held by bottom-anchor, and ramps associated thereto, which are located within the territorial jurisdiction of the municipality. A written application for an annual permit for small structures accessory to residences must be submitted to the harbormaster or other designated local official when a city or town has been approved by the Department to administer a local permitting program under 310 CMR 9.07(3), unless a license or other authorization under 310 CMR 9.00 is obtained from the Department. The harbormaster or other designated local official shall establish a schedule for receipt of applications. Completed applications shall be acted upon within a period of 15 days from receipt, according to the schedule. Any permit may contain such terms, conditions and restrictions as deemed necessary, consistent with the requirements of 310 CMR 9.07. No license shall be required from the Department if an annual permit is issued pursuant to 310 CMR 9.07. A city or town implementing 310 CMR 9.07 shall not discriminate against any citizen of the Commonwealth on the basis of residency, race, religion, sex, age, disability, or other illegal distinction. The provisions of 310 CMR 9.07 shall be enforced by local officials. The Department may enforce the provisions of 310 CMR 9.07 upon the request of a local permitting program or upon a finding that local enforcement is inadequate.

(2) Annual Permits for Moorings, Floats and Rafts.

(a) The harbormaster or other local official shall provide a written procedure for the fair and equitable assignment from a waiting list for use of vacant or new moorings, floats or rafts held by bottom-anchor and ramps associated thereto. Methods for mooring assignment which are appropriate include, but are not limited to, one or more of the following:

1. date of application;
2. physical characteristics of vessels, *e.g.*, size and type;
3. purpose of vessel use, *e.g.*, commercial vs. recreational or public vs. private.

The harbormaster, however, may allow the previous permit holder of a mooring to renew, on an annual basis, that mooring or another mooring within the control of the harbormaster.

(b) If the placement of floats or rafts for public recreational boating facilities, exclusive of moorings, extends beyond any established state harbor line, encompasses an area greater than 2,000 square feet, or constitutes a marina, additional procedures apply:

1. a public hearing must be held by the harbormaster or other local official in the affected municipality with notice at least seven days in advance published in the local newspaper at the expense of the applicant; and
2. the harbormaster or other local official must set forth the reasons for issuing such permit in a written statement, which must include findings to the effect that the project will serve a public purpose, will not unreasonably interfere with navigation in the harbor, and:
  - a. cannot be located reasonably within the harbor line, if the project extends beyond such line; and/or
  - b. complies with the provisions of 310 CMR 9.39(1), if the project includes a marina.



## 9.07: continued

A copy of the permit and written statement shall be submitted upon issuance to the Department. The Department may review any such permit within 30 days of receipt and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary.

(c) No permit for a mooring, float or raft may authorize unreasonable interference with the public rights to use waterways for any lawful purposes including fishing, fowling, and navigation in tidelands and Great Ponds. All permits shall meet the terms and conditions described in 310 CMR 9.07(4).

(d) No permit for a mooring, float or raft shall be transferrable to another person, except to a person within the immediate family of the permittee upon approval of the harbor master. Nothing in 310 CMR 9.07 shall be construed to prevent moorings for which permits are issued to a recreational boating facility from being assigned to individual patrons or members of such facility.

(3) Annual Permits for Small Structures Accessory to Residences.

(a) Petition for Local Permitting Program. A city or town may petition the Department for approval to administer a local permitting program for small structures accessory to residences. The Department shall state the basis for approval or denial of any petition in writing. The Department may withdraw its approval of a local permitting program if it determines that the local program exhibits a repeated failure to comply with the provisions of 310 CMR 9.07.

1. A city or town may elect to issue permits for small structures accessory to residences under the provisions of 310 CMR 9.07. The city or town shall provide public notice and an opportunity to comment on the petition for approval prior to its submittal to the Department. The petition shall include:

- a. the designation of a local official or local governmental body to administer the program;
- b. a demonstration that public access has been or will be provided to waterbodies within the town, including at least one formal means of access to the waterway, reasonable in type and scope for the waterway and its anticipated use by any citizen of the Commonwealth, established prior to the date of the petition or scheduled to be available within a reasonable period of time; and
- c. provision that any fees collected be used for support of the local permitting program, the improvement of waterways, or the enhancement of public access to or along waterways.

2. Where the Legislature has created a lake commission (e.g., the Lake Quinsigamond Commission) with authority to issue permits, the commission may petition the Department for approval under 310 CMR 9.07(3), without designation by a city or town.

3. A local permitting program may also be approved by the Department if it provides substantially equivalent procedures and protection of public rights as 310 CMR 9.07. A city or town may petition for approval of a local permitting program pursuant to a local ordinance or bylaw. Where the Legislature has created a lake commission with authority to issue permits, the commission may petition the Department for approval of regulations implementing a local permitting program. Upon request, the Department shall provide advisory opinions on draft petitions for approval.

(b) Eligibility. An application for a local permit under 310 CMR 9.07(3) may be submitted only for a project consisting entirely of a dock, pier, seawall, bulkhead, or other small-scale structure that is accessory to a residential use or serves as a noncommercial community docking facility, provided that:

1. for proposed structures, or for structures built or substantially altered after January 1, 1984:
  - a. any structure is water-dependent and pile-supported (e.g., by wooden or metal posts) or bottom-anchored, without any fill;
  - b. any structures total no more than 300 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;
  - c. the structure is not a marina (i.e., does not serve ten or more vessels);
  - d. if within an ACEC, such structures were existing on October 4, 1990 and, if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary, said structures are consistent with said plan;

## 9.07: continued

- e. if within an ACEC, such structures, if built or substantially altered after October 4, 1990, are consistent with a resource management plan adopted by the municipality and approved by the Secretary; and
- 2. for structures or fill constructed prior to January 1, 1984 and not substantially altered since that date:
  - a. any structure or fill must be water-dependent;
  - b. any structure and fill total no more than 600 square feet below the mean high water shoreline for coastal waters and below the ordinary high water shoreline for inland waters;
  - c. the structure is not a marina (*i.e.*, does not serve ten or more vessels).
- (c) Standards. The local permitting program must find that the structure is limited to the minimum size necessary to achieve the intended water-related purposes, will not significantly interfere with any public rights to use waterways for fishing, fowling, navigation and other lawful purposes, mitigates for any interference by providing lateral access or other mitigation according to guidance issued by the Department, and complies with the provisions of 310 CMR 9.07.
- (d) Application Requirements. The initial application shall be accompanied by plans or other documentation sufficient to accurately show the location and size of the structure. For proposed structures, the applicant must provide an Order of Conditions, a negative or conditional negative Determination of Applicability, or evidence of written request for action by the Conservation Commission and subsequent failure of the Conservation Commission to respond. For existing structures, no permit shall be issued if the Conservation Commission has determined that the structure or fill is in violation of the Wetlands Protection Act, M.G.L. c. 131, § 40. The applicant shall provide notice to the Selectmen or Mayor, the Conservation Commission, and to abutters for proposed structures and for previously unauthorized structures. The applicant shall also publish a public notice of the project in a newspaper of general circulation, which may serve as joint notice for M.G.L. c. 91 and M.G.L. 131, § 40. Notices must be provided or published at least ten business days prior to the deadline for receipt of applications established by the local permitting program. Notices must include the applicant's name and address, the location and a concise description of the project, the address to which comments may be sent, and the deadline for receipt of comments.
- (e) Program Requirements. The local program shall send to the Department a copy of each permit issued for proposed or previously unauthorized structures, but not renewals. The local program shall maintain in the municipality a list of applicants and permittees, and provide the list to any person upon written request. The local permitting program shall annually publish a public notice of its intention to renew permits for small structures in specifically named water bodies at least ten business days prior to the renewal date, identifying the address where information on the renewal applications may be obtained and comments should be sent, and specifying the deadline for receipt of comments. A copy of the annual notice and a list of permittees shall be sent to the Department. Any written comments within the scope of M.G.L. c. 91 submitted to the local permitting program on any permit application shall be considered, and a permit may not be issued prior to the close of the public comment period. A copy of any permit on which public comment was received shall be sent immediately upon issuance or renewal to persons submitting comments and to the Department.
- (f) Renewals and Transfer. Projects meeting the provisions of 310 CMR 9.07(3), which previously obtained an annual permit, license, amnesty license or interim approval, may apply for extension of authorization under 310 CMR 9.07 as a renewal. No individual notice is required for renewals, unless specifically requested by the local permitting program. A permit for an eligible small structure attached to land under 310 CMR 9.07(3) is transferrable upon change of ownership of the land to a new owner.
- (4) Terms and Conditions Applicable to all Annual Permits.
  - (a) No permit may be valid for a period longer than to the end of any given calendar year.
  - (b) No permit may authorize structures other than the placement of moorings, floats, rafts or eligible small structures accessory to residences under 310 CMR 9.07.
  - (c) No permit shall be construed as authorizing the placement of moorings, floats, rafts, or other structures on private tidelands of anyone other than the applicant if objected to by the owner or owners thereof.

## 9.07: continued

(d) No permit may authorize the placement of moorings, floats, rafts or other structures in any navigation channel or turning basin formally designated by the federal or state government or by a municipality pursuant to a municipal harbor plan, unless the designating authority or other agency with jurisdiction over said area has previously approved such placement.

(e) No permit shall be inconsistent with the municipal harbor plan, if any, or unless permitted under 310 CMR 9.07(2)(b), be issued for a project extending beyond the harbor line.

(f) No mooring, float, raft, or other small structure may interfere with public rights associated with a common landing, public easement, or other historic legal form of public access that may exist on or adjacent to the project site.

(g) Any person receiving a permit for a small structure accessory to a residence shall post signage as required by the city or town in accordance with guidance issued by the Department.

(5) Review of Local Decision.

(a) Any applicant aggrieved by a refusal to permit a mooring, float, raft, or small structure accessory to a residence or by any condition or restriction imposed relative thereto, may request a review in writing to the Department within 30 days after receiving notice of such refusal or of the imposition of such condition or restriction. The failure of the harbormaster, other local official, or local program to act upon a complete application within a reasonable time shall be deemed by the Department to be a denial of a permit. A copy of the request shall be sent at the same time to the harbormaster, other local official, or local permitting program.

(b) The Department may review any permit within 30 days of receipt, with notification to the applicant, harbormaster or other local official, or local program, and may either affirm the permit, set such action aside or amend such action by imposing its own conditions and restrictions as deemed necessary. The Department may review a permit upon its own initiative or may initiate a review upon written request of any person who submitted written comments on a permit application to a harbormaster, other local official, or local permitting program and who sends the request to the Department within ten days of the postmarked date of the permit or of the decision on a renewal.

(c) The Department shall consider all written comments from the harbormaster, other local official, local permitting program, the applicant, and interested persons that are submitted within 30 days of the date of receipt of the request by the Department pursuant to 310 CMR 9.07(5)(a), or of the date the Department initiates a review pursuant to 310 CMR 9.07(5)(b).

(d) The Department may conduct a site inspection or a public hearing if deemed appropriate.

(e) After reviewing the request and other relevant documents, the Department shall render a written determination either affirming the local action, setting such action aside, or amending such action by imposing its own conditions and restrictions as deemed necessary.

(f) The Department shall affirm the local decision except upon a finding that:

1. it is arbitrary, capricious, or an abuse of discretion;
2. it conflicts with an overriding state, regional, or federal public interest;
3. it fails to meet any requirement contained in 310 CMR 9.07;
4. it was based on plans or other documentation submitted with the application which contained substantially inaccurate or incomplete depictions of the structure and its surroundings; or
5. it allows floats, rafts, or small structures which significantly interfere with public rights to use waterways for fishing, fowling, and navigation or for other lawful purposes.

The Department shall issue its decision within 30 days of the close of the period for comments described in 310 CMR 9.07(5)(c).

(g) The Department's decision shall be the final administrative review under 310 CMR 9.07; there shall be no right to an adjudicatory hearing.

9.08: Enforcement

- (1) The Department may seek discontinuation of use, removal, or other remedial action in the case of any fill or structure in waterways that is determined to be a public nuisance, in accordance with M.G.L. c. 91, § 23 or as otherwise provided by law. Such fill or structures include those not previously authorized by the Department or the Legislature, those for which a grant or license is not presently valid pursuant to 310 CMR 9.00, or those not conforming to the terms and conditions of a grant or license.
- (2) In accordance with M.G.L. c. 91, § 49B, the Department shall remove or cause to be removed any fill or structure in waterways which, in the opinion of the Department, is dilapidated, unsafe, a menace to navigation, or is a source of floating debris that is, or is liable to become, a menace to navigation.
- (3) In addition to any remedy specified pursuant to M.G.L. c. 91, to the Civil Administrative Penalties Statute, M.G.L. c. 21A, § 16, or to other laws of the Commonwealth, the Department may issue Enforcement Orders requiring compliance with any regulation herein or with any condition of any license or permit issued by the Department. The employees of the Department may enter at reasonable hours upon any property subject to a license, permit, grant, or public easement to inspect for compliance either prior to or following completion of construction of the authorized structure.

9.09: Effective Date and Severability

- (1) 310 CMR 9.00 shall take effect on October 4, 1990. Revisions to 310 CMR 9.07 and 9.10 shall take effect on April 19, 1996. Revisions to 310 CMR 9.00 shall take effect on July 1, 2000.
- (2) Except as provided in 310 CMR 9.28, 310 CMR 9.00 shall apply to any application for a license, permit, or amendment thereto, and to all subsequent proceedings related thereto, if:
  - (a) said application is filed on or after the effective date of 310 CMR 9.00; or
  - (b) in the case of an application for a nonwater-dependent use project including one or more activities requiring an EIR, except for any such project which the Department determines, with the concurrence of the municipal planning board, provides essential economic support to an associated water-dependent use project of particular statewide or regional significance, a Certificate of the Secretary stating that a Draft EIR adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H had not been issued as of the effective date of 310 CMR 9.00.
- (3) In the case of any application for license, permit, or amendment thereto filed prior to the effective date of 310 CMR 9.00, except for that to which 310 CMR 9.00 apply pursuant to 310 CMR 9.09(2)(b), the prior applicable regulations shall remain in full force and effect for all subsequent proceedings related thereto; such application shall be subject to the content and other requirements of 310 CMR 9.11(2)(a), 9.11(2)(b)1. through 3., and 9.11(5) only.
- (4) 310 CMR 9.08, 9.22, 9.23, 9.25, 9.26 and 9.27 shall apply to all projects for which a license or permit was in effect on the effective date of 310 CMR 9.00, or is obtained in accordance with 310 CMR 9.09(3), and for which a new license or permit application is not required pursuant to 310 CMR 9.05(3).
- (5) Severability - If any provision of any part of 310 CMR 9.00, or the application thereof, is held to be invalid, such invalidity shall not affect any other provision of 310 CMR 9.00.

9.10: Simplified Procedures for Small Structures Accessory to Residences

- (1) Projects Eligible for Simplified Procedures. Notwithstanding other procedural provisions of 310 CMR 9.00 to the contrary, the procedural standards of 310 CMR 9.10 shall apply to the licensing of certain small-scale structures by the Department. An application for a license under 310 CMR 9.10 may be submitted only for a project consisting entirely of a dock, pier, seawall, bulkhead, or other small-scale structure that is accessory to a residential use or serves as a noncommercial community docking facility, provided that:
  - (a) for proposed structures, or for structures built or substantially altered after January 1, 1984:

## 9.10: continued

1. any structure is water-dependent and pile-supported (*e.g.*, by wooden or metal posts) or bottom-anchored, without any fill;
  2. any structures total no more than 300 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;
  3. any structure is not a marina (*i.e.*, does not serve ten or more vessels);
  4. if within an ACEC, such structures were existing on October 4, 1990 and if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary, said structures are consistent with said plan.
  5. if within an ACEC, any structure built or substantially altered after October 4, 1990 is consistent with a resource management plan adopted by the municipality and approved by the Secretary; and
- (b) for structures or fill constructed prior to January 1, 1984 and not substantially altered since that date:
1. any structure or fill may be water-dependent or nonwater-dependent;
  2. any structures and fill total no more than 600 square feet below the mean high water shoreline for coastal waters or below the ordinary high water shoreline for inland waters;
  3. the structure is not a marina (*i.e.*, does not serve ten or more vessels).

The above thresholds are established for determination of eligibility only; structures licensed under 310 CMR 9.10 shall be the minimum size necessary to achieve the intended water-related purposes. Projects meeting the provisions of 310 CMR 9.10(1), which previously obtained a license, amnesty license or interim approval, may apply for renewal under 310 CMR 9.07, 9.10, or 9.25.

(2) Standards. The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes. The project shall preserve public rights of access on private tidelands that are associated with fishing, fowling, and navigation, and public rights to use Commonwealth tidelands, Great Ponds, and other waterways for any lawful use. The provisions of 310 CMR 9.35 through 9.38 apply to projects authorized under 310 CMR 9.10 except that, notwithstanding the provisions of 310 CMR 9.37(1)(a), fill and structures need not be certified by a Registered Professional Engineer except as specified in 310 CMR 9.10(3). For eligible nonwater-dependent structures or fill, the Department will generally presume that a proper public purpose is served through the provision of on-foot passage to ensure lateral public access along the shore for any lawful purpose.

(3) Applications Under Simplified Procedures. For purpose of authorizing eligible projects under simplified procedures the following provisions apply:

(a) Application and Plans. An applicant for a license shall submit a written application on forms provided by the Department, signed by the applicant and the landowner if other than the applicant. The application shall be prepared in accordance with all applicable instructions contained in the Department's application package. When plans have been submitted with a Notice of Intent or referenced in an Order of Conditions under the Wetlands Protection Act, M.G.L. c. 131, § 40, a copy of those plans shall accompany the application. Under the Wetlands Protection Act, Conservation Commissions and the Department generally require plans for new structures to be certified by a Registered Professional Engineer or Registered Land Surveyor where there are questions relating to structural integrity (*e.g.*, where a structure is located in a velocity zone or floodway) or to the location of important wetland resource areas (*e.g.*, salt marsh or eelgrass), as well as in other circumstances at the discretion of the issuing authority; see instructions for filing a Notice of Intent at 310 CMR 10.99.

If plans certified by an engineer or surveyor are not required under M.G.L. c. 131, § 40, the Wetlands Protection Act pursuant to 310 CMR 10.00, certification for projects meeting the eligibility requirements of 310 CMR 9.10(1) will generally not be required. However, based on comments submitted during the public comment period or other relevant information, the Department may require plans to be certified by a Registered Professional Engineer or Registered Land Surveyor for a structure when it finds that the preparation of plans by a professional is necessary to ensure:

1. an adequate review of public access;
2. the preservation of public navigational rights;
3. structural integrity;
4. the accuracy of stated distances from property boundaries; or

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5. that the plan is sufficiently clear and accurate to allow a licensing decision which otherwise could result in significant interference with public rights or environmental interests in tidelands, Great Ponds, and other waterways. The Department will provide a statement of reasons to support this finding.

When plans have not been prepared under M.G.L. c. 131, § 40, the Wetlands Protection Act, a plot plan or other scaled plan with structures to be licensed measured accurately from lot lines or other structures shall be prepared in accordance with application instructions.

(b) Applications for projects within Great Ponds. The Department shall publish an inventory of Great Ponds which shall be available upon written request. Prior to the addition of any pond to the inventory, the Department will hold a public hearing in the vicinity of the pond. After a pond is added to the inventory, the Department will provide an opportunity for owners of existing structures that require licenses to come into compliance with M.G.L. c. 91 regulatory requirements by submission of an application within six months from the date of the addition of the pond to the inventory. The Department will take no enforcement action against the owners of a structure on a Great Pond not listed on the inventory unless and until the Great Pond has been added to the inventory and the opportunity for compliance has been afforded.

(c) Coordination with the Conservation Commission. At least 45 days prior to issuance of a license, the Department and the applicant shall coordinate with the Conservation Commission as follows:

1. The Department will not require Conservation Commission approval for existing structures built before enactment of M.G.L. c. 131, § 40, the Wetlands Protection Act (1963 for coastal wetlands and 1965 for inland wetlands) and not substantially altered subsequently. Applicants should consult their local Conservation Commission regarding application of the Wetlands Protection Act to maintenance or alteration of existing structures.

2. For structures built between 1963 or 1965 (as applicable) and December 31, 1983, and not substantially altered after the latter date, the Department shall provide notice of the application to the Conservation Commission and shall proceed with licensing unless the Conservation Commission informs the Department that it has provided written notice to the applicant prior to the close of the public comment period to promote compliance with or to enforce M.G.L. c. 131, § 40, the Wetlands Protection Act.

3. For structures proposed, built, or substantially altered on or after January 1, 1984, applicants shall provide an Order of Conditions or a negative or conditional negative Determination of Applicability. The Department may waive the requirement of 310 CMR 9.10(3)(c)3. based upon evidence of a written request for action by an applicant to a Conservation Commission, and subsequent failure of the Conservation Commission to respond.

(d) The applicant shall submit the notice of the application included in the application package to the Board of Selectmen or Mayor, the planning board, zoning authority and the Conservation Commission of the town or city where the work will be performed. The Department shall presume compliance with applicable state and local requirements unless it receives information to the contrary during the public comment period. Unless the Department receives a contrary determination from the proper zoning authority, signed by the Clerk of the affected municipality, compliance with applicable zoning ordinances and bylaws shall be deemed certified 45 days after notice to that zoning authority and clerk. Proposed structures must also conform to plans for waterways developed by agencies or commissions with legal authority, such as municipal harbor plans or lake or regional commission plans. The Department shall respect the standards prescribed by local ordinances or bylaws adopted to implement a local permitting program pursuant to 310 CMR 9.07.

(e) Public Notice and Notice to Abutters. The applicant shall publish in a newspaper of general circulation in the area where the project is located a public notice including the applicant's name and address, the project location, a description of the project, a statement that written comments will be accepted within 30 days of the Notification Date stated therein, the address where comments may be sent, and a statement that a municipality, ten citizen group or any aggrieved person who has submitted written comments may also petition to intervene to become a party before the close of the public comment period and that failure to submit such a petition will result in the waiver of any right to an adjudicatory hearing. A copy of the notice shall also be sent by the applicant to all abutters to the residential property

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where the structure is or may be located, by certified mail, return receipt requested. With the agreement of the Conservation Commission, joint notice under M.G.L. c. 131, § 40 and c. 91 may be published and sent to abutters, provided it contains the requisite information and meets the requisite standards pursuant to each statute.

(f) Fees. All applicants for licenses under simplified procedures shall pay the application fee (\$50), or the renewal fee (\$25), in accordance with the provisions of 310 CMR 9.16. No tidewater displacement fees shall be assessed. Any person granted a license from the Department in, on or over any land the title to which is in the Commonwealth shall compensate the Commonwealth for the rights granted in such lands through payment of an occupation fee (\$1 per square yard per year for the term of the license), in accordance with the provisions of 310 CMR 9.16. No occupation fee shall be assessed by the Department for structures within the enhanced portion of Great Ponds. An occupation fee shall be assessed for the portion of any structure that the Department determines, after opportunity for public comment, extends below the natural high water mark into the historic portion of the Great Pond. Enhanced Great Ponds are those which contain a surface area greater than their historic natural state, resulting from alteration by damming or other human activity.

(4) Decision on Applications. The Department shall issue a license, draft license, or written determination to deny a license within 90 days of a complete application, commencing no earlier than the close of the public comment period and in accordance with 310 CMR 9.11(2)(c). In implementing M.G.L. c. 91, § 14, for structures extending beyond the line of riparian ownership, the Department may issue licenses in accordance with the conditions of any advance approval by the Governor, provided the Department finds the project meets the standards of 310 CMR 9.10.

(5) Terms and Recordation for Licenses from the Department. The license term shall be ten years unless the Department determines that a shorter term is necessary to protect the public interest. In accordance with M.G.L. c. 91, § 18, the license, with the plan as an exhibit, shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of issuance. Failure to record the license and accompanying plan within 60 days will render the license void in accordance with M.G.L. c. 91, § 18.

(6) Renewal and Transfer of Licenses from the Department. A license may be renewed provided the structure remains sound and conforms to plans submitted with the original application. At the time an application for renewal is submitted, the applicant shall send a notice of application for renewal included in the application package to the mayor or board of selectmen, planning board, and conservation commission of the city or town where the project site is located. The Department may require additional public notice based on comments received about the structure or other relevant information. If such additional public notice for renewal is required, the public comment period is 30 days. Applicants for renewal shall pay a renewal fee (\$25). Any person applying for a renewal under 310 CMR 9.10, including renewals of interim approvals or licenses originally granted under the Amnesty Program, shall compensate the Commonwealth for the rights granted in such lands through payment of an occupation fee (\$1 per square yard per year for the term of the license), in accordance with the provisions of 310 CMR 9.16. Unless otherwise provided in the license, a valid license shall run with the land and shall automatically be transferred upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the license shall be transferred to the new landowner upon recording of the changed ownership.

(7) Appeals. The appeal provisions in 310 CMR 9.17 apply to projects licensed under 310 CMR 9.10.

9.11: Application Requirements(1) Pre-Application Consultation

(a) Upon request of a prospective applicant for a license for any large or complex project, including those required to file an EIR, the Department shall conduct a pre-application consultation meeting in order to receive a presentation of the project proposal, provide preliminary guidance on the applicability of the substantive standards of 310 CMR 9.00 to the project, explain the necessary licensing procedures, and answer any appropriate inquiries concerning the program or 310 CMR 9.00. Where appropriate, the Department may invite representatives of CZM, any other state agency, or representatives of the municipality in which the project is located, including the lead agency responsible for implementation of a municipal harbor plan. The participants in the pre-application consultation meeting may make arrangements for further consultation sessions and for co-ordinated review of the project.

(b) In the case of an unusually large and complex set of activities undertaken by a public agency the Department may establish, in cooperation with the prospective applicant, a special procedure for the review of one or more applications for such activities. Such procedure may include, without limitation, as deemed appropriate by the Department, consolidation procedures, expedited review, and single or multiple licenses, permits, or written determinations. Public notice of any such procedure established under 310 CMR 9.11 shall be published in the *Environmental Monitor*.

(2) Application Review Schedules.

(a) For a water-dependent use project, or a project eligible for simplified procedures under 310 CMR 9.10, the Department shall, within 45 days of receipt of the information required under 310 CMR 9.11(3)(a) and (b), assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). Within 40 days of the notification date, the Department may hold a public hearing under 310 CMR 9.13(2). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 60 days of the close of the public comment period, the Department shall conduct an administrative completeness review under 310 CMR 9.11(3)(c) and either determine the application to be complete or request additional information. Within 90 days of making a determination of administrative completeness, the Department shall complete a technical review and issue either a draft license or a final license as specified in 310 CMR 9.14.

(b) For a nonwater-dependent use project, the applicant may elect one of four application options by submitting the selected category of application under the Timely Action and Fee Schedule at 310 CMR 4.00.

1. Partial Application. Within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a) and (b), the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 40 days of the notification date, and at least 20 days prior to the close of the public comment period, the Department shall hold the public hearing under 310 CMR 9.13(3). The applicant shall submit the information identified in 310 CMR 9.11(3)(c)2. prior to the close of the public comment period, and the information identified in 310 CMR 9.11(3)(c)1. and 3. prior to the issuance of the written determination. Within 30 days of the close of the public comment period, the Department shall conduct its administrative completeness review and determine the application to be complete or request additional information. Within 60 days of determining the application to be complete, or 90 days from the close of the public comment period, whichever comes later, the Department shall issue the written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.



2. Full Application. Within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a), and 310 CMR 9.11(3)(b)1., 2., 6., and 7., and 310 CMR 9.11(3)(c)1. through 3., the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, conduct an administrative completeness review of the information received, and determine the application to be complete or request additional information. The Department shall issue a public notice under 310 CMR 9.13(1) upon determination that the application is complete. The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. The Department shall provide upon request the draft license conditions seven days prior to the public hearing. Within 40 days of the notification date, and at least 20 days prior to the close of the public comment period, the Department shall hold the public hearing under 310 CMR 9.13(3). Within 60 days from the close of the public comment period or the submission of the information identified in 310 CMR 9.11(3)(c)4., and 5., whichever is later, the Department shall issue the written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

3. Municipal Harbor Plan Application. For a project within an area governed by and in compliance with a Municipal Harbor Plan approved under 301 CMR 23.00, within 45 days of receiving an application containing the information identified in 310 CMR 9.11(3)(a) and (b), the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, and issue a public notice under 310 CMR 9.13(1). The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. Within 40 days of the notification date, and at least 20 days prior to the close of the public comment period, the Department shall hold the public hearing under 310 CMR 9.13(3). Within 30 days of the close of the public comment period the Department shall conduct its administrative completeness review and determine an application to be complete or request additional information. Within 45 days of determining an application to be complete, the Department shall issue a written determination under 310 CMR 9.14(1). The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

4. Joint MEPA EIR Application. An applicant may initiate coordinated review under MEPA and 310 CMR 9.00 by specifying in the Environmental Notification Form (ENF) filing under 301 CMR 11.05 the intent to pursue a joint filing. With the ENF, the applicant shall submit a notice of the public consultation session under 301 CMR 11.06(2) for publication in the Environmental Monitor. The Final EIR submitted under 301 CMR 11.07(4) shall also include information to meet the application requirements of 310 CMR 9.11(3)(a) through (c). Within 25 days of receipt of a Final EIR meeting the requirements of 310 CMR 9.11(3)(a) through (c) and the Secretary's certificate on the Final EIR or Supplemental FEIR, the Department shall assign a file number, make a determination of water-dependency under 310 CMR 9.12, conduct an administrative completeness review, determine the application to be complete or request additional information, and issue the public notice under 310 CMR 9.13(1). The Department shall provide upon request the draft license conditions, seven days prior to the public hearing. The Department shall hold a public hearing within 15 days of the notification date. The public comment period shall begin at the notification date and end no less than 30 days and no more than 60 days from the notification date. The Department shall issue the written determination under 310 CMR 9.14(1) within 30 days of the close of the public comment period or a determination that the application is complete, whichever is later. The Department shall issue the final license under 310 CMR 9.14(5) within 45 days of the expiration of the appeal period or final decision, or 15 days from the date of the Governor's signature, whichever is later.

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**SUMMARY TABLE OF APPLICATION REVIEW SCHEDULES: Nonwater-dependent projects**  
(shows maximum timelines)

| <u>DEP Action</u>  | <u>Partial Application</u>   | <u>Full Application</u>  | <u>Municipal Harbor Plan</u>   | <u>Joint MEPA EIR</u>  |
|--|--|--|--|--|
| 1. From date application received/Assign file number and public notice | 45 days  | 45 days (administrative completeness review also completed)          | 45 days  | 25 days from receipt of Certification on Final EIR and SEIR          |
| 2. Conduct public hearing  | 40 days  | 40 days  | 40 days  | 15 days  |
| 3. Public Comment Period Closed  | No less than 30 days and no more than 60 days from notification date | No less than 30 days and no more than 60 days from notification date | No less than 30 days and no more than 60 days from notification date | No less than 30 days and no more than 60 days from notification date |
| 4. Determine File to be Complete                                       | 30 days  | -----  | 30 days  | -----  |
| 5. Issue Written Determination and Draft License                       | 60 days  | 60 days  | 45 days  | 30 days  |
| 6. Appeal Period   | 21 days  | 21 days  | 21 days  | 21 days  |
| 7. Issue License (or date of Governor's signature, whichever is later) | 45 days  | 45 days  | 45 days  | 45 days  |

(c) For a project requiring a permit under 310 CMR 9.05(2), the Department shall, within 45 days of receiving an application with all information identified in 310 CMR 9.11(3)(a) and (b), assign a file number, make a determination of water dependency, issue a public notice under 310 CMR 9.13(1), conduct an administrative completeness review, and determine the application to be complete or request additional information. The public comment period shall be 15 days from the notification date. Within 45 days from the date the application is complete the Department shall issue a permit decision.

(3) Filing and Completion of Application

(a) An applicant for a license or permit shall submit a written application on forms provided by the Department, signed by the applicant and the landowner if other than the applicant. In lieu of the landowner's signature, the applicant may provide other evidence of legal authority to submit an application for the project site. The application shall be prepared in accordance with all applicable instructions contained in the Department's application package. A partial application under 310 CMR 9.11(2)(b)1. requires only the information identified in 310 CMR 9.11(3)(a) and (b).

(b) The Department shall assign a file number to the project only upon receipt of an application which includes the following information:

1. the names and addresses of the applicant, all landowners, any representative thereof and the abutters to the project site;
2. detailed description of the proposed project which identifies:
  - a. the location of the project site, and whether it lies within a DPA, ACEC, or Ocean Sanctuary; and

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- b. the specific use(s) of existing and proposed fill and structures and, if dredging is involved, estimates of the volume of dredged material and a description of the dredged material disposal area;
  - 3. a set of plans containing at least the applicable information specified in 310 CMR 9.11(3)(a) through (c); the Department may accept appropriately-scaled preliminary plans in lieu of final plans certified in accordance with 310 CMR 9.11(2)(c)1., provided such preliminary plans are prepared by:
    - a. a Registered Professional Engineer, Land Surveyor, or Architect, as deemed appropriate by the Department; and
    - b. in the case of a nonwater-dependent use project requiring an EIR, a Registered Landscape Architect unless otherwise deemed appropriate by the Department;
  - 4. initial documentation relative to other state and local approvals which must be obtained by the project, as specified in 310 CMR 9.11(3)(c)3. and a copy of any approvals which may have been obtained already;
  - 5. any other preliminary information specified in the application instruction package;
  - 6. payment of the application fee in accordance with the provisions of 310 CMR 9.16(1); and
  - 7. a Certificate from the Secretary of the Executive Office of Environmental Affairs demonstrating compliance with MEPA, with the exception of a joint MEPA Application under 310 CMR 9.11(2)(b)4. For a project subject to MEPA, the Department will not issue a public notice until the Secretary has issued a Certificate on the Final EIR.
- (c) The Department shall determine an application to be complete only if the following information has been submitted:
- 1. a set of final plans which are prepared in accordance with the format standards required for recording of licenses in the appropriate Registry of Deeds or Land Court for the district in which the licensed activity is to be performed; and which are certified by a Registered Professional Engineer or Land Surveyor, as deemed appropriate by the Department containing, at a minimum, the following:
    - a. an appropriately-scaled location map of the project site, and of any area where dredged material disposal will occur;
    - b. appropriately-scaled principal dimensions and elevations of proposed and existing fill and structures and, if dredging is involved, the principal dimensions of all relevant footprints, contours and slopes;
    - c. a delineation of the present high and low water marks, as relevant;
    - d. a delineation of the historic high and low water marks, as relevant and in a manner acceptable to the Department in accordance with the definitions thereof at 310 CMR 9.02;
    - e. references to any previous licenses or other authorizations for existing fill, structures, or dredging at the project site, and a delineation thereof as well as a delineation of any historic dredging, filling, or impoundment;
    - f. indication of any base flood elevation of the statistical 100-year storm event, or of any coastal high hazard area, which is located on the project site; and
    - g. indication of the location of any on-site or nearby state harbor lines, federal pier and bulkhead lines, federal channel lines, and public landings or other easements for public access to the water.
  - 2. a statement as to how the project serves a proper public purpose, provides greater benefit than detriment to public rights in tidelands or Great Ponds, and is consistent with the policies of the Coastal Zone Management Program, as applicable, in accordance with the provisions of 310 CMR 9.31(2); and a description of how the project conforms to any applicable provisions of a municipal harbor plan, pursuant to 310 CMR 9.34(2);
  - 3. final documentation relative to other state and local approvals which must be obtained by the project including:
    - a. a list of state environmental regulatory programs with which the project must comply, in accordance with the applicable provisions of 310 CMR 9.33; and a copy of the Notice of Intent if the project is subject to M.G.L. c. 131, § 40 and 310 CMR 10.00 but does not trigger M.G.L. c. 30, §§ 61 through 62H review;
    - b. a copy of the Environmental Notification Form (ENF) and Certificate of the Secretary thereon, if the project triggers M.G.L. c. 30, §§ 61 through 62H review;

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- c. if the project is subject to zoning but will not require any municipal approvals thereunder, a certification to that effect pursuant to 310 CMR 9.34(1);
  - d. a certification that a copy of the license application has been submitted to the planning board of each city or town where the work is to be performed, except in the case of a proposed bridge, dam, or similar structure across a river, cove, or inlet, in which case notice shall be given to the planning board of every municipality into which the tidewater of said river, cove, or inlet extends;
  - e. if an EIR is required, a copy of the final EIR and the Certificate of the Secretary stating that it adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H; and, if applicable, any Notice of Project Change and any determination issued thereon in accordance with M.G.L. c. 30, §§ 61 through 62H;
  - f. a final Order of Conditions and a Water Quality Certificate, if applicable pursuant to 310 CMR 9.33, and a certification of compliance with municipal zoning, if applicable pursuant to 310 CMR 9.34(1); or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance; and
  - g. copies of all other state regulatory approvals if applicable pursuant to 310 CMR 9.33; or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance, or to issue the license or permit contingent upon subsequent receipt of such approvals.
- 4. responses to public comment submitted to the Department within the public comment period, as deemed appropriate by the Department; and
  - 5. any additional plans, documentation, and other information which have been requested by the Department, or a statement by the applicant indicating that no further information will be forthcoming in response to such request.
- (4) Additional Information and Extensions.
- (a) The Department shall request additional information as soon as practicable when an application is incomplete or when otherwise allowed under 310 CMR 9.00. Applicants shall provide requested information as soon as practicable but no later than 180 days from the request.
  - (b) With the consent of the applicant or upon the applicant submitting revised or additional information, the Department may extend the period for actions under 310 CMR 9.11 as provided under 310 CMR 4.04.
- (5) Expiration of Application
- (a) An application shall expire if the applicant has failed to diligently pursue the issuance of said license or permit in proceedings under 310 CMR 9.00.
  - (b) With the exception of applications filed under 310 CMR 9.28, an application shall be presumed to have expired six months after any request for additional information by the Department unless the applicant submits information showing that:
    - 1. good cause exists for the delay of proceedings under 310 CMR 9.00; and
    - 2. the applicant has continued to pursue the project diligently in other forums in the intervening period; provided, however, that unfavorable financial circumstances shall not constitute good cause for delay.
  - (c) No application shall be deemed to have expired under 310 CMR 9.11 when a completed application is pending and when the applicant has provided all information necessary for the Department to determine whether to issue a license or permit.

9.12: Determination of Water-Dependency

- (1) Prior to issuance of the public notice, the Department shall classify the project as a water-dependent use project or as a nonwater-dependent use project. The Department shall classify as a water-dependent use project any project which consists entirely of:
    - (a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2); and/or
    - (b) uses determined to be accessory to a water-dependent use, in accordance with 310 CMR 9.12(3).
- Any other project shall be classified as a nonwater-dependent use project.

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(2) The Department shall determine a use to be water-dependent upon a finding that said use requires direct access to or location in tidal or inland waters, and therefore cannot be located away from said waters. In making this determination, the Department shall act in accordance with the following provisions.

- (a) The Department shall find to be water-dependent the following uses:
  - 1. any use found to be water-dependent-industrial in accordance with 310 CMR 9.12(2)(b);
  - 2. marinas, boat basins, channels, storage areas, and other commercial or recreational boating facilities;
  - 3. facilities for fishing, swimming, diving, and other water-based recreational activities;
  - 4. parks, esplanades, boardwalks, and other pedestrian facilities that promote use and enjoyment of the water by the general public and are located at or near the water's edge, including but not limited to any park adjacent to a waterway and created by a public agency;

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5. aquariums and other education, research, or training facilities dedicated primarily to marine purposes;
  6. aquaculture facilities;
  7. beach nourishment;
  8. waterborne passenger transportation facilities, such as those serving ferries, cruise ships, commuter and excursion boats, and water shuttles and taxis;
  9. dredging for navigation channels, boat basins, and other water-dependent purposes, and subaqueous disposal of the dredged materials below the low water mark;
  10. navigation aids, marine police and fire stations, and other facilities which promote public safety and law enforcement on the waterways;
  11. shore protection structures, such as seawalls, bulkheads, revetments, dikes, breakwaters, and any associated fill which are necessary either to protect an existing structure from natural erosion or accretion, or to protect, construct, or expand a water-dependent use;
  12. flood, water level, or tidal control facilities;
  13. discharge pipes, outfalls, tunnels, and diffuser systems for conveyance of stormwater, wastewater, or other effluents to a receiving waterway;
  14. facilities and activities undertaken or required by a public agency for purposes of decontamination, capping, or disposal of polluted aquatic sediments; and
  15. wildlife refuges, bird sanctuaries, nesting areas, or other wildlife habitats.
- (b) The Department shall find to be water-dependent-industrial the following uses:
1. marine terminals and related facilities for the transfer between ship and shore, and the storage of, bulk materials or other goods transported in waterborne commerce;
  2. facilities associated with commercial passenger vessel operations;
  3. manufacturing facilities relying primarily on the bulk receipt or shipment of goods by waterborne transportation;
  4. commercial fishing and fish processing facilities;
  5. boatyards, dry docks, and other facilities related to the construction, serving, maintenance, repair, or storage of vessels or other marine structures;
  6. facilities for tug boats, barges, dredges, or other vessels engaged in port operations or marine construction;
  7. any water-dependent use listed in 310 CMR 9.12(2)(a)9. through 14., provided the Department determines such use to be associated with the operation of a Designated Port Area;
  8. hydroelectric power generating facilities; and
  9. other industrial uses or infrastructure facilities which cannot reasonably be located at an inland site as determined in accordance with 310 CMR 9.12(2)(c) or (d).
- (c) In the case of industrial and infrastructure facilities not listed in 310 CMR 9.12(2)(b), which are dependent on marine transportation or require large volumes of water to be withdrawn from or discharged to a waterway for cooling, process, or treatment purposes, the Department shall act in accordance with the following provisions:
1. the Department shall presume to be water-dependent any alteration or expansion of a facility existing or licensed as of the effective date of 310 CMR 9.00, and any energy facility for which the proposed location has been approved by the Energy Facilities Siting Council; this presumption may be overcome only upon a clear showing that the proposed alteration or expansion or energy facility can reasonably be located or operated away from tidal or inland waters;
  2. except as provided in 310 CMR 9.12(2)(c)1., the Department shall presume that any such industrial or infrastructure facility is not water-dependent; this presumption may be overcome only upon a clear showing that such facility cannot reasonably be located or operated away from tidal or inland waters.
- If an EIR is submitted, the findings necessary to overcome the above presumptions shall be based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62H. If an EIR is not submitted, such findings shall be based on information presented to the Department in the application and during the public comment period thereon.

## 9.12: continued

(d) In the case of an infrastructure crossing facility, or any ancillary facility thereto, for which an EIR is submitted, the Department shall find such facility to be water-dependent only if the Secretary has determined that such facility cannot reasonably be located or operated away from tidal or inland waters, based on a comprehensive analysis of alternatives and other information analyzing measures that can be taken to avoid or minimize adverse impacts on the environment, in accordance with M.G.L. c. 30, §§ 61 through 62H. If an EIR is not submitted, such finding may be made by the Department based on information presented in the application and during the public comment period thereon.

(e) The Department shall not find the following uses to be water-dependent:

1. restaurants and other food/beverage service establishments;
2. retail shops and stores;
3. parking facilities;
4. office facilities;
5. housing units and other residential facilities;
6. hotels, motels, and other facilities for transient lodging;
7. parks, esplanades, boardwalks, and other pedestrian facilities other than those described in 310 CMR 9.12(2)(a)4.;
8. roads, causeways, railways, and other facilities for land-based vehicular movement, other than those found to be water-dependent in accordance with 310 CMR 9.12(2)(c) or (d); and
9. subaqueous disposal, below the low water mark, of material excavated or otherwise originating on land.

(3) The Department may determine a use to be accessory to a water-dependent use upon a finding that said use is customarily associated with and necessary to accommodate a principal water-dependent use. Such a finding shall be made only if the proposed use is:

- (a) integral in function to the construction or operation of the water-dependent use in question, or provides related goods and services primarily to persons engaged in such use; and
- (b) commensurate in scale with the operation of the water-dependent use in question.

Examples of uses that may be determined to be accessory to a water-dependent use include, but are not limited to, access and interior roadways, parking facilities, administrative offices and other offices primarily providing services to water-dependent uses on the site, yacht clubhouses, restaurants and retail facilities primarily serving patrons of the water-dependent use on the site, bait shops, chandleries, boat sales, and other marine-oriented retail facilities. Uses that may not be determined to be accessory to a water-dependent use include, but are not limited to, general residential facilities, hotels, general office facilities, and major retail establishments.

(4) The Department shall find to be nonwater-dependent any use which has not been found to be water-dependent or accessory to a water-dependent use, pursuant to 310 CMR 9.12(2) and (3).

### 9.13: Public Notice and Participation Requirements

#### (1) Notice Requirements.

(a) Public notice shall be issued by the Department but distributed and published by the applicant. When the Department holds a public hearing, the date of the notice and public hearing shall be determined by the Department. The applicant shall send a notice of license or permit application as described in 310 CMR 9.13(1)(c), by first class mail, return receipt, to:

1. the municipal official, the planning board, the conservation commission, and the harbor master, if any, in the city or town where the project is located;
2. if the application is for a proposed bridge, dam or similar structure across a tidal river, cove or inlet, the municipal official, the planning board, the conservation commission, and the harbor master of every municipality into which the tidewater of said river, cove, or inlet extends;
3. the Martha's Vineyard Commission or the Cape Cod Commission, if the project is located within an area subject to the jurisdiction of said Commission;



## 9.13: continued

4. CZM, if the project is located within the coastal zone; DEM, if the project is located in an Ocean Sanctuary; and the Department of Fisheries, Wildlife, and Environmental Law Enforcement;
5. the *Environmental Monitor* for all projects exceeding M.G.L. c. 30, §§ 61 through 62H review thresholds for Waterways activities;
6. all landowners of the project site and abutters thereto, as identified pursuant to 310 CMR 9.11(2)(b)1.; and
7. U.S. Army Corps of Engineers, New England Division.

(b) At least 45 days prior to issuance of a license, or 21 days prior to issuance of a permit, the applicant shall cause, at his own expense and at the direction of the Department, notice as described in 310 CMR 9.13(1)(c)1. through 9., to be published in one or more newspapers having circulation in the area affected by the project.

(c) Notice shall contain:

1. the name and address of the applicant and the applicant's representative, if any;
2. a description of the location of the project, including whether it is located in an ACEC, DPA, or an Ocean Sanctuary;
3. a description of the project including a listing of uses and the Department's determination of water-dependency;
4. for nonwater-dependent use projects, and for any water-dependent use project for which the Department decides to hold a hearing, the time, place and location of the public hearing and the date on which the public comment period ends;
5. for other water-dependent use projects, a statement that within 30 days of the notification date of a license application or within 15 days of the notification date of a permit application, written comments will be accepted, and that a public hearing may be held upon request by the municipal official;
6. the address where the application may be viewed, where a copy of the draft license conditions may be obtained if applicable, and where public comments regarding the application may be sent;
7. a statement that a municipality, ten citizen group or any aggrieved person that has submitted written comments before the close of the public comment period may appeal and that failure to submit written comments will result in the waiver of any right to an adjudicatory hearing;
8. the notification date, as defined in 310 CMR 9.02;
9. for applications submitted under 310 CMR 9.11(2)(b)2. and 4., the date that copies of the Department's draft license conditions will be available seven days prior to the public hearing; and
10. an 8½" x 11" copy of the site plan, including a locus insert, of the project site.

(2) Participation by CZM or DEM. Within the public comment period specified in 310 CMR 9.13(4), CZM, for projects in the coastal zone, or DEM, for projects in an Ocean Sanctuary, may notify the Department in writing that it intends to participate in license or permit proceedings. The notice shall identify issues relevant to CZM program policies or DEM provisions for compliance with M.G.L. c. 132A, §§ 13 through 16 and 18, the Ocean Sanctuaries Act and participation shall be limited to identified issues. A copy of any such notice shall be sent to the applicant. If CZM or DEM files such notice, the Department shall give CZM or DEM an opportunity to participate in all meetings between the applicant and the Department concerning issues identified in the notice. If CZM or DEM has filed a notice of participation regarding a license or permit proceeding, DEM shall prepare a written statement as to whether the project complies with M.G.L. c. 132A, §§ 13 through 16 and 18, the Ocean Sanctuaries Act and CZM shall prepare a written statement as to whether the project is consistent with the policies of the CZM Program, prior to issuance of the written determination, license, permit, or draft thereof by the Department pursuant to 310 CMR 9.14. The Department shall presume that a project is consistent with CZM policies or DEM provisions for compliance with the Ocean Sanctuaries Act unless CZM or DEM submits a notice of its intent to participate and written comments during the public comment period.

(3) Public Hearing

- (a) For nonwater-dependent use projects, the Department shall hold a public hearing in the city or town in which the project is located.

## 9.13: continued

- (b) For water-dependent use projects, the municipal official in the city or town in which the project is located may, within the public comment period specified in 310 CMR 9.13(4), request that the Department conduct a public hearing on the application. If such a request is filed, a hearing shall be conducted in said municipality if reasonable arrangements for such hearing are made by the municipality.
  - (c) The Department may conduct a public hearing on a project for which a hearing is not otherwise required. Any person requesting that the Department exercise its discretion to conduct such hearing must file a written request, including a statement of reasons, within the public comment period specified in 310 CMR 9.13(4).
  - (d) In the event that the project requires a federal action which is subject to CZM federal consistency review under 301 CMR 21.00 and CZM determines a public hearing related to consistency certification is appropriate pursuant to 301 CMR 21.13, CZM and the Department may conduct a joint hearing. The Department may also conduct joint hearings on the project with the US Army Corps of Engineers.
  - (e) The public hearing shall be noticed in accordance with 310 CMR 9.13(1), and shall be scheduled no later than 40 days after the notification date. For projects requiring an EIR, such public hearing generally will occur after issuance by the Secretary of a Certificate stating that the final EIR adequately and properly complies with M.G.L. c. 30, §§ 61 through 62H, unless otherwise deemed appropriate by the Department.
  - (f) In the event that a project is located in more than one municipality, the Department may conduct a single public hearing in one of such municipalities.
  - (g) If prior to the public hearing CZM or DEM has filed notice of its intent to participate in license or permit proceedings pursuant to 310 CMR 9.13(2), the Department shall give CZM or DEM the opportunity to co-chair said hearing.
- (4) Public Comment Period and Intervention
- (a) If a public hearing is held, any person may submit written comments to the Department on the license or permit application within 20 days of the close of the public hearing or within any additional public comment period granted by the Department.
  - (b) If no public hearing is held, any person may submit written comments to the Department on a license application within 30 days, or on a permit application within 15 days of the notification date or within any additional public comment period granted by the Department.
  - (c) A municipality, ten citizen group, or any aggrieved person that has submitted written comments before the close of the public comment period specified above may appeal in accordance with 310 CMR 9.17. Failure to submit written comments will result in the waiver of any right to an adjudicatory hearing.
- (5) Planning Board Recommendation
- (a) Within 30 days of receipt of a license application for a project on tidelands and Great Ponds, the planning board of the municipality where the project is located may hold a public hearing.
  - (b) Within 15 days of conducting said public hearing, or within 45 days of receipt of the license application if no public hearing has been conducted, the planning board shall submit a written recommendation to the Department stating whether and why said planning board believes the project:
    - 1. would not be detrimental to the public rights in tidelands and Great Ponds; and
    - 2. serves a proper public purpose, except in the case of water-dependent use projects entirely on private tidelands.
  - (c) If the planning board provides a written recommendation as provided above, the Department shall take into consideration the recommendation in making its decision whether to grant a license. If the planning board fails to conduct a public hearing or submit a written recommendation as provided above, the Department may proceed to make a determination whether to issue a license without the benefit of the planning board's recommendation.

9.14: Decision on License and Permit Applications

- (1) For all nonwater-dependent use projects the Department shall issue a written determination in accordance with the provisions of 310 CMR 9.31-9.60, including proposed license conditions, for public review prior to issuance of a license.
- (2) For water-dependent use projects the Department may issue a license or permit without issuing a written determination, in accordance with the provisions of 310 CMR 9.31 through 9.50, unless:
  - (a) the Department has conducted a public hearing, in which case the Department shall issue a written determination including proposed license or permit conditions, for public review prior to issuance of the license or permit;
  - (b) written comments have been submitted pursuant to 310 CMR 9.13(4)(c), in which case the Department may issue a draft license or draft permit, including proposed license or permit conditions, for public review prior to issuance of the license or permit; or
  - (c) the Department has decided to deny the license or permit application, in which case the Department shall issue a written determination setting forth the reasons for such decision.
- (3) A written determination shall include a description of the project and a statement of whether the project serves a proper public purpose which provides greater benefits than detriments to the public rights in tidelands. Unless the Department has decided to deny the license or permit application, the written determination will be issued with the draft license or permit conditions.
- (4) If the project includes a set of activities, including without limitation those to which 310 CMR 9.11(1)(b) applies, which cannot reasonably be incorporated into a single license, the Department may upon request of the applicant issue a consolidated written determination which allows for multiple licenses to be issued independently for phases of said project, provided the Department finds that the licenses can be sequenced or conditioned in a manner which ensures that overall public benefits will exceed public detriments as each portion of the project is completed. Notwithstanding 310 CMR 9.14(3), licenses may be issued pursuant to a consolidated written determination issued under this provision for up to five years, with opportunity for extensions as deemed appropriate by the Department.
- (5) The Department shall issue a license, permit, draft license, draft permit, or written determination, as appropriate after the application is determined to be complete by the Department, in accordance with the provisions of 310 CMR 9.11(3)(c). The Department may extend such deadline upon request by the applicant. Where a draft license, draft permit, or written determination is issued, the final license or permit shall not be issued prior to receipt of the state and local approvals specified in 310 CMR 9.11(3)(c)3.
- (6) Upon issuance, the Department shall send a copy of the license, permit, or written determination to:
  - (a) the applicant;
  - (b) any intervenor and any person who has requested a copy of said license, permit, or written determination;
  - (c) CZM or DEM, if it has notified the Department pursuant to 310 CMR 9.13(2); and
  - (d) the municipal official, conservation commission, planning board, and harbormaster, if any, of the city or town where the project is located.

In the case of a draft license or draft permit, the Department shall send copies to all parties listed in 310 CMR 9.14(6)(a) through (c) and to any party listed in 310 CMR 9.14(6)(d) who has commented on the application within the public comment period.
- (7) The Department shall issue a license or permit after the completion of any appeal period established pursuant to 310 CMR 9.17(2) or the receipt of any plans, documentation, or other information requested by the Department in a written determination, whichever is later, unless a notice of claim for adjudicatory hearing has been filed pursuant to 310 CMR 9.17.

9.15: Terms(1) Term of License

(a) All licenses issued by the Department shall contain a condition stating the term for which license is in effect, if any. All licenses shall be in effect for a fixed term not to exceed 30 years, unless otherwise deemed appropriate by the Department in accordance with 310 CMR 9.15(1)(b) through (d).

(b) Notwithstanding 310 CMR 9.15(1)(a), the Department may issue a license that establishes an extended fixed term, in accordance with the following provisions:

1. said term shall not exceed 65 years for any project or portion thereof which, upon completion, will be located on flowed tidelands or other waterways, and shall not exceed 99 years for any project or portion thereof which will be located on filled tidelands or Great Ponds; in the event the project site includes both flowed and filled tidelands, the Department may upon request of the applicant establish a single weighted average term for the entire project, or for a portion thereof as deemed appropriate by the Department, based on the relative amounts of the surface area of the flowed and filled tidelands associated therewith;

2. the applicant shall provide justification that an extended term is warranted given the expected life of the structure, typical financing requirements, consistency with a municipal harbor plan, if any, appropriateness of long-term dedication of tidelands to the proposed use(s) in the particular location, and any other relevant factors;

3. for projects on Commonwealth tidelands or Great Ponds, the Department shall conduct a public hearing and issue written findings concerning the extended term, in accordance with the provisions of 310 CMR 9.13(3) and 9.14;

4. for projects on Commonwealth tidelands or Great Ponds held by the Commonwealth, the licensee shall pay an occupation fee based on an appraisal, in accordance with the provisions of 310 CMR 9.16(3)(b) through (c); and

5. the Department shall require the licensee to submit periodic license compliance inspection reports as a condition of the license for nonwater-dependent use projects, and for other projects as deemed appropriate by the Department.

(c) The Department shall issue a license for an unlimited term for any project whose entire control, development, and operation is undertaken by a public agency for the provision of services directly to the public (or to another public agency for such provision to the public) by the public agency, its contractor or agent, unless an unlimited term is not deemed appropriate by the Department.

(d) Notwithstanding the terms of license specified in 310 CMR 9.15(1)(b) and (c):

1. in Designated Port Areas, the term of license for any nonwater-dependent use in a marine industrial park shall not exceed 65 years; the term of license for any supporting DPA use shall not exceed 30 years; and the term of license for any temporary use shall not exceed ten years; and

2. outside of Designated Port Areas, the term of license for any stationary vessel for uses as described in 310 CMR 9.32(1)(a)6. shall not exceed 30 years.

(e) The term of a license may be renewed in accordance with the provisions of 310 CMR 9.25(2).

(2) Term of Permit. Any permit shall be valid for a fixed term not to exceed five years; provided, however, that maintenance dredging may be performed for up to ten years after the permit has been issued, if such terms are so stated in the permit.

9.16: Fees

(1) Application Fee. An application fee shall be charged in accordance with the accompanying fee schedule (Table 1) per application for a determination of applicability, license, permit, amendment, interim approval, or certificate of compliance. An application fee is non-refundable and shall be paid at the time of submission of the original application, by check or money order made payable to the Commonwealth of Massachusetts, DEP.

## 9.16: continued

(2) Tidewater Displacement Fee. Except as provided in 310 CMR 9.16(4), prior to issuance of a license for any fill or structure that will displace tidewaters below the high water mark, the applicant, or his/her heirs or assignees responsible for such displacement, shall, at the direction of the Department:

- (a) pay to the Commonwealth a tidewater displacement fee, based on the net amount of tidewater displaced between the elevations of the high and the low water marks, at the rate set forth in the accompanying fee schedule (Table 1); or
- (b) excavate, in some part of the same harbor, previously filled tidelands between the high and low water marks, subject to the requirements of 310 CMR 9.00 and the approval of the Department, in order to form a basin for a quantity of water equal to that displaced; or
- (c) improve public harbor facilities in tidelands in any other manner satisfactory to the Department, provided that the cost of such improvement is comparable to the amount otherwise due for displacement; any improvements identified under 310 CMR 9.16 shall be in addition to any actions required under 310 CMR 9.31 through 9.40 and 310 CMR 9.51 through 9.55; the Department may consider the following improvements:
  - 1. a harbor cleanup activity which is part of a plan approved by a public agency;
  - 2. a shellfish reseeding program;
  - 3. a beach nourishment program on beaches open to the public;
  - 4. a contribution to a special fund or other program managed by a public agency or non-profit organization in order to directly provide public harbor improvements.

An applicant for a license for any existing, previously unlicensed fill or structure shall be liable for any unpaid tidewater displacement fee, unless the applicant was not responsible for the construction of the structure or the placement of the fill, and the applicant acquired the real estate upon which the structure was constructed or the fill placed before January 4, 1974.

(3) Occupation Fee. Except as provided in 310 CMR 9.16(4), any person granted a license for any activity in 310 CMR 9.05 in, on, or over any land the title to which is in the Commonwealth shall compensate the Commonwealth for the rights granted in such lands, in accordance with the following provisions:

- (a) except as provided in 310 CMR 9.16(3)(b), the licensee shall pay a fee which shall be:
  - 1. fixed for the term of the license;
  - 2. calculated by the Department in accordance with the accompanying fee schedule (Table 1); and
  - 3. assessed on either a lump sum or annual basis, in accordance with the provisions of 310 CMR 9.16(3)(d).
- (b) the licensee shall pay an annual fee based on the full fair market rental value over the term of the license, as determined in accordance with 310 CMR 9.16(3)(c), in the event that the license is issued for:
  - 1. an extended term, in accordance with the provisions of 310 CMR 9.15(1)(b); or
  - 2. long term exclusive assignment of berths in a private recreational boating facility, in accordance with the provisions of 310 CMR 9.38(2)(a)2.

The Department shall presume that land the title to which is in the Commonwealth includes all Commonwealth tidelands and Great Ponds unless the applicant presents evidence of a chain of title indicating that the Commonwealth is not the fee owner of the land in question.

(c) Appraisal Procedure.

- 1. The determination of fair market value and fair market rental value shall be based on an appraisal of the value of the rights granted in land the title to which is in the Commonwealth and which is occupied in accordance with the license. Such determination shall include an index or other method by which periodic fee adjustments shall be made over the term of the license. The appraisal report shall be prepared at the expense of the applicant by a professional appraiser who is a member of the Massachusetts Board of Real Estate Appraisers, the American Institute of Real Estate Appraisers, or the Society of Real Estate Appraisers. The appraisal report shall be submitted to the Department after issuance of the Department's written determination to issue a license.

2. Within 45 days of receipt of the appraisal report, the Department shall conduct a review of the appraisal report. Said review appraisal shall be prepared by a professional appraiser who is a member of the Massachusetts Board of Real Estate Appraisers, the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. If the Department determines that the appraisal report is complete and accurate, the annual license fee shall be established based on the fair market rental value determined by the Department, based on said report. If the Department determines that the appraisal report is incomplete or inaccurate, the Department shall inform the applicant in writing of the deficiencies in the appraisal report. Upon review of the Department's evaluation, the applicant may:

a. submit a new or revised appraisal report to the Department for its review and approval; or

b. notify the Department of disagreement with the Department's review appraisal and provide the reasons therefor. If the Department and the applicant cannot agree within 30 days of said notification, both the Department and the applicant shall within 30 days designate a third, impartial professional appraiser who is a member of the Massachusetts Board of Real Estate Appraisers, the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. The cost of the third appraiser shall be born equally by the Department and the applicant. The third appraiser shall prepare an appraisal report after reviewing the initial report, the review appraisal and any other information deemed appropriate and shall make a recommendation to the Department as to the fair market value and fair market rental value. The Department shall presume that the values determined in that report are accurate and shall establish the annual license fee based on the fair market rental value determined therein. This presumption may be overcome only if the Commissioner issues written findings based on evidence presented in the appraisal reports before the Department explaining the reasons for disagreement with the recommendations of the third appraisal report.

(d) Payment of fees. Any fee the total amount of which during the term of the license is less than \$10,000 shall be assessed as a lump sum payable in full prior to license issuance. Any fee the total amount of which during the term of the license is more than \$10,000 may be assessed at the discretion of the applicant as a lump sum payable in full prior to license issuance or as a series of fixed annual payments which shall be required as a condition of the license. The initial payment of such annual fee shall be paid in full prior to the issuance of the license. All such fees shall be paid by certified check or money order made payable to the Commonwealth of Massachusetts, DEP.

(e) Payment of occupation fee for existing fill or structures

1. Any person who is granted a license for existing fill or structures, the fee for which has not been paid, shall pay the fee, if any, in effect at the time the license is granted.

2. Any person who is granted a license or license amendment for a water-dependent use project involving a change in use or structural alteration to existing fill or structures shall pay the occupation fee in effect at the time the license is granted for any portion of the project site for which a lump sum occupation fee has not been previously paid.

3. Any person who is granted a license or license amendment for a nonwater-dependent use project involving a change in use or structural alteration to existing fill or structures shall pay the occupation fee in effect at the time the license is granted for the entire project site; but shall be given credit for any lump sum occupation fee previously paid for the portion of tidelands previously occupied, pro-rated for the remaining term of the license. For purpose of calculating the credit pursuant to 310 CMR 9.16(3)(e), the lump sum occupation fee for any license with an unlimited term shall be pro-rated over a 30-year period from the date said license was issued.

4. Notwithstanding 310 CMR 9.16(3)(e)2., any person who is granted a license or license amendment for a private recreational boating facility with long-term exclusive assignment of berths pursuant to 310 CMR 9.38(2)(a)2. shall pay the fee in accordance with 310 CMR 9.16(3)(e)3.

## 9.16: continued

(4) Exemption from fees for certain projects.

(a) Public agencies. The fees described herein at 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a municipality or other public agency undertaking a public service project, provided that said project does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner.

(b) Non-profit organizations. The fees described herein at 310 CMR 9.16(2) and 9.16(3) shall not be applicable to a non-profit organization as defined in 310 CMR 9.02, if:

1. the project is a facility of public accommodation which does not deny access to its services and facilities to any citizen of the Commonwealth in a discriminatory manner;
2. the project is not intended to generate revenues in excess of that needed for construction, operation and maintenance of the uses specified in the license; and
3. said organization has not been created for the purpose of avoiding said fees while sheltering profits in another entity.

(c) Projects authorized by permits. The fees described herein in 310 CMR 9.16(2) and 9.16(3) shall not be applicable to any project authorized by permit.

(d) Recreational boating facilities authorized by the MDC. For any recreational boating facility authorized by the Metropolitan District Commission (MDC), the occupation fees described herein at 310 CMR 9.16(3) shall be reduced by the amount of any fee paid to the MDC for occupation of a waterway.

(e) Projects licensed under the Simplified Procedures for Small Structures Accessory to Residences pursuant to 310 CMR 9.10 shall be exempted from payment of Tidewater Displacement Fees.

TABLE 1 ■ FEES

|   | Water-Dependent<br>Use Projects/1<br>(Accessory to a<br>residential use of a<br>4 dwelling units) | Other Water-<br>Dependent<br>Use Projects | Residential<br>Non-Water<br>Dependent Use<br>Projects (a 4<br>dwelling units) | Other Non-<br>Water<br>Dependent<br>Use Projects | Licenses<br>with<br>Extended<br>Terms | Any Small<br>Scale Project<br>under<br>310 CMR<br>9.10 |
|---|---|---|---|--|---------------------------------------|--|
| Determination of<br>Applicability<br>Application                          | \$50.00   | \$50.00                                   | \$50.00   | \$200.00   | \$200.00                              | \$50.00  |
| License or Permit<br>Application  | \$100.00  | \$250.00                                  | \$500.00  | \$1500.00  | \$2500.00                             | \$50.00  |
| License of Permit<br>Amendment or<br>Renewal Application                  | \$50.00   | \$100.00                                  | \$250.00  | \$750.00   | \$1000.00                             | \$25.00  |
| Certificate of<br>Compliance<br>Application                               | \$50.00   | \$50.00                                   | \$100.00  | \$100.00   | \$200.00                              | N/A  |
| Tidewater<br>Displacement Fee (per<br>cubic yard)                         | \$2.00  | \$2.00                                    | \$10.00   | \$10.00  | \$10.00                               | N/A  |
| Occupation Fee/2 (per<br>square yard of land held<br>by the Commonwealth) | \$1.00 x term<br>of license   | ----                                      | \$2.00 x term<br>of license   | -----  | Appraisal                             | \$1.00 x term<br>of license                            |

<sup>1.</sup> Except for facilities subject to 310 CMR 9.16(3)(b)2., for which the applicable fees shall be the same as those listed for licenses with extended terms.

<sup>2.</sup> The fee is calculated by multiplying the dollar rate shown by the length of the license term, in years, and by the area of occupied land held by the Commonwealth. This is a fixed fee for the term of the license and is assessed on a lump sum basis,

9.17: Appeals

except as provided in 310 CMR 9.16(3)(d).



## 9.17: Appeals

- (1) The following persons shall have the right to an adjudicatory hearing concerning a decision by the Department to grant or deny a license or permit:
  - (a) an applicant who has demonstrated property rights in the lands in question, or which is a public agency;
  - (b) any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period;
  - (c) ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, § 10A, who have submitted written comments within the public comment period;
  - (d) the municipal official in the affected municipality who has submitted written comments within the public comment period;
  - (e) CZM, for any project in the coastal zone, if it has filed a notice of participation within the public comment period; and
  - (f) DEM, for any project in an Ocean Sanctuary, if it has filed a notice of participation within the public comment period.
- (2) Any notice of claim for an adjudicatory hearing must be sent by certified mail or hand delivery to the Department within 21 days of the date of the written determination, draft license or draft permit, or if no such determination or draft is required, within 21 days of the date of issuance of the license or permit, as appropriate under 310 CMR 9.14(1) and (2). A copy must be sent at the same time by certified mail or hand delivery to the applicant and to the municipal official of the city or town where the project is located.
- (3) Any notice of claim for an adjudicatory hearing must include the following information:
  - (a) the DEP Waterways Application File Number, name of the applicant and address of the project;
  - (b) the complete name, address, and telephone number of the party filing the request and, if represented by counsel, the name, address and telephone number of the attorney and, if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in 310 CMR 9.02;
  - (c) a clear statement that a formal adjudicatory hearing is being requested;
  - (d) a clear and concise statement of the facts which are grounds for the proceeding, the specific objections to the Department's written determination, draft license, draft permit, license or permit, and the relief sought through the adjudicatory hearing, including specifically the changes desired in the final written determination, license, or permit; and
  - (e) a statement that a copy of the request has been sent to:
    1. the applicant; and
    2. the municipal official of the city or town where the project is located.
- (4) The Department may coordinate adjudicatory hearings under 310 CMR 9.17 and under M.G.L. c. 131, § 40 and 310 CMR 10.000, as follows:
  - (a) if a final order has been issued pursuant to the Wetlands Protection Act, the Department shall exclude issues within the jurisdiction of that statute at an adjudicatory hearing held under 310 CMR 9.17, except as provided in 310 CMR 9.33(3);
  - (b) if an adjudicatory hearing has been requested under 310 CMR 9.17 and under M.G.L. c. 130, § 40 and 310 CMR 10.000, the Department may consolidate these proceedings.

9.18: Recording

- (1) The license and accompanying plan shall be recorded at the Registry of Deeds within the chain of title of the affected property within 60 days of the date of issuance. In the case of recorded land, the license shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the project is located. In the case of registered land, the license shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the project is located. When a license involves more than one parcel of land the license shall be recorded in the chain of title for all relevant deeds.

## 9.18: continued

- (2) Written notice of said recording shall be given to the Department, including an identification of the Registry of Deeds or Land Court in which the license is recorded, the date of recording and the instrument or document number, prior to commencement of the project authorized under the license.
- (3) Failure to record the license and accompanying plan within 60 days will render said license void in accordance with 310 CMR 9.26(2)(b)1.

9.19: Certificate of Compliance

- (1) Within 60 days of the completion of any licensed project, but in no event later than five years from the date of license issuance, or any extension thereof, the applicant shall request in writing that the Department issue a certificate of compliance. The request shall be accompanied by a certification by a registered professional engineer licensed to do business in the Commonwealth that the project was completed according to the plans, specifications, and conditions of the license. The Department may conduct a site inspection at any time to determine compliance prior or subsequent to issuing a certificate. The Department may issue a partial certificate of compliance for a portion of a project if all public benefits associated with such portion have also been provided.
- (2) The license for any project for which such a request is not filed and certificate issued may be revoked pursuant to 310 CMR 9.26(1).

9.20: Authorization of Emergency Actions

In an emergency situation where swift and immediate action is essential to avoid or eliminate a serious and immediate threat to health, safety, or the environment, the Department may approve a project or portion thereof, without a license or permit, in accordance with the following procedures.

- (1) A written request shall be submitted to DEP which describes the location, and work to be performed and specifies why the project is necessary for the protection of the health or safety of the public or the environment. Accompanying this request shall be a written statement from a federal, state or municipal agency certifying that there is an emergency and specifying why said project is necessary to avoid or eliminate a serious and immediate threat to public health, safety, or the environment.
- (2) Emergency approval shall be issued in writing and shall specify the limits of activities necessary to abate the emergency.
- (3) When the necessity for undertaking the emergency action no longer exists, any emergency action taken under 310 CMR 9.20 shall cease until the provisions of 310 CMR 9.00 have been complied with. In any event, the time limit for performance of emergency work shall not exceed 30 days, unless a written extension is approved by the Commissioner or appropriate Regional Director.
- (4) In all cases under 310 CMR 9.20, the person performing any emergency work is required to submit a license or permit application in accordance with 310 CMR 9.11 within 30 days of the date of emergency approval unless a written extension is approved by the Commissioner. Following the review of the application, the Department may require any modification to the emergency work that it deems necessary.
- (5) In emergency situations where written notice is not feasible, verbal notice to and approval by the Commissioner or appropriate Regional Director may be substituted until written notice can be feasibly submitted.
- (6) No work authorized under an emergency approval pursuant to 310 CMR 9.00 may be undertaken without emergency authorization under M.G.L. c. 131, § 40 and 310 CMR 10.00 and M.G.L. c. 30, §§ 61 through 62H, where applicable.

9.21: Variances

(1) Required Findings. The Commissioner may waive the application of any other section of 310 CMR 9.00 by making a written finding following a public hearing that:

- (a) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00;
- (b) the project includes mitigation measures to minimize interference with the public interests in waterways and that the project incorporates measures designed to compensate the public for any remaining detriment to such interests; and
- (c) the variance is necessary:
  - 1. to accommodate an overriding municipal, regional, state or federal interest; or
  - 2. to avoid such restriction on the use of private property as to constitute an unconstitutional taking without compensation; or
  - 3. to avoid substantial hardship for the continuation of any use or structure existing as of October 4, 1990, and for which no substantial change in use or substantial structural alteration has occurred since that date.

(2) Procedure

(a) A request for a variance shall be filed by the applicant prior to publication of the notice of public hearing pursuant to 310 CMR 9.13(1). The request shall be in writing and shall include, at a minimum, the following information:

- 1. an identification of the regulation(s) from which the variance is sought;
- 2. a description of alternative designs, locations, or construction methods which would achieve the purpose of the project without the need for the variance;
- 3. an explanation of why each of the alternatives is unreasonable;
- 4. an analysis of any detriments to interests of the public in waterways due to the proposed project and an explanation of how the detriments have been minimized;
- 5. a description of the measures that will be provided to compensate for any remaining detriment to public interests in waterways; and
- 6. a description and supporting documentation of the overriding public interest served by the project, if applicable; or
- 7. documentation that the project is a continuation of a use or structure existing as of January 1, 1984; that there has not been a substantial change in use or substantial structural alteration since that date; and that application of 310 CMR 9.00 would cause substantial hardship to the applicant, if applicable; or
- 8. a legal analysis, with supporting documentation, explaining why application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking without compensation, if applicable.

(b) Notice of the variance request shall be published in accordance with 310 CMR 9.13(1) and shall explicitly indicate that a variance is being requested. The Department shall hold a public hearing in accordance with 310 CMR 9.13(3) upon which the Commissioner's findings shall be based. Upon issuance of a variance an adjudicatory hearing is available in accordance with 310 CMR 9.17.

(c) For projects for which an EIR will be prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, the information required pursuant to the provisions of 310 CMR 9.21(2)(a)1. through 7., should be included in the EIR if the need for a variance is reasonably foreseeable. If the variance issue was addressed in the final EIR, the Commissioner shall presume that the description of alternatives contained therein satisfies the requirements of 310 CMR 9.21(2)(a)2. Notwithstanding this presumption, the Commissioner may require any modification of the project reasonably within the scope of an alternative within the final EIR.

(3) Commentary. The variance process is intended to apply in the rare and unusual circumstance where a proposed project satisfies a public interest which overrides the public interest in waterways but cannot be implemented in a manner which is fully consistent with the provisions of 310 CMR 9.00; where application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking of property; or where application of 310 CMR 9.00 would cause substantial hardship for the continuation of a use or structure existing as of October 4, 1990. The variance process is designed to ensure that a full investigation is made to determine whether the proposed project serves an overriding public interest which outweighs harm to the public resulting from lack of adherence to 310 CMR 9.21 and whether all measures are taken which ensure that detriments to the public interests in waterways are minimized.

9.22: Maintenance, Repair, and Minor Project Modifications

(1) Maintenance and Repair of Fill and Structures. During the term for which the license is in effect, the licensee shall maintain and repair all authorized fill and structures in good working order for the uses authorized in the license, and in accordance with the conditions specified therein. No application for license or license amendment shall be required for such activity. Maintenance and repair include, among other things, the following activities:

- (a) replacement of old pilings, decking, or rip-rap, all with material of the same dimensions and quality and in the same locations and elevations as that authorized in the license;
- (b) repaving of road surfaces, installation of road curbs and lighting, replacement of railroad track, stabilization of road or rail beds, reconstruction of culverts and catch basins, and other maintenance or repair of existing public transportation facilities and associated drainage systems, as necessary to preserve or restore the serviceability of such facilities for the original use, provided that maintenance and repair shall not include the substantial enlargement of such facilities, such as roadway widening, adding shoulders, or upgrading substandard intersections;
- (c) restoration to the original license specifications of licensed fill or structures that have been damaged by catastrophic events, provided that no change in use occurs and that:
  - 1. such restoration is completed within two years of the damage-causing event;
  - 2. in the case of flood-related damage, the cost of such restoration does not exceed 50% of the cost of total replacement according to the original license specifications;
  - 3. the licensee provides the Department with written notice of the restoration at least ten days prior to commencement of such work; in the case of flood-related damage, said notice shall include written estimates of restoration and replacement costs; and
  - 4. the licensee provides the Department with written notice that the repair work has been completed in accordance with the license specifications, as certified by a Registered Professional Engineer, within 60 days of such completion; and
- (d) demolition and removal of unused structures that are obsolete or otherwise no longer suitable for the uses authorized in the license, provided that written approval by the Department is obtained prior to the commencement of such work.

(2) Maintenance Dredging. Maintenance dredging may occur for five years from the date of issuance of the license or permit or for such other term, not exceeding ten years, specified therein, provided that the written notice required pursuant to the Wetlands Protection Act (M.G.L. c. 131, § 40 and 310 CMR 10.00) has been filed with the Conservation Commission and a copy has been sent to the Department.

(3) Minor Project Modifications. The licensee may undertake minor modifications to a licensed project, or a project exempt from licensing pursuant to 310 CMR 9.05(3)(b) through (h), without filing an application for license or license amendment. Such modifications are limited to:

- (a) structural alterations which are confined to the existing footprint of the fill or structures being altered and which represent an insignificant deviation from the original specifications of the license, in terms of size, configuration, materials, or other relevant design or fabrication parameters;
- (b) changes of use which maintain or enhance public benefits provided by the project and which represent an insignificant deviation from the original use statement of the license, in terms of function, character, duration, patronage, or other relevant parameters; or
- (c) replacement of subsurface utilities, or installation of additional utility lines in an existing right of way within previously authorized filled tidelands connecting to existing structures, provided the work will not restrict or impair access to water-dependent uses.

No such modifications shall be undertaken until the licensee has submitted written notice to the Department describing the proposed work in sufficient detail, with reference to any relevant license plans, for the Department to determine compliance with the above conditions. If the Department does not object within 30 days, the licensee may proceed with the described work without further approval by the Department.

## 9.22: continued

- (4) Nothing in 310 CMR 9.22(1) through (3) provisions shall be construed to exempt the work in question from obtaining other applicable approvals, including but not limited to an order of conditions under M.G.L. c. 131, § 40 and 310 CMR 10.00.

9.23: Transfer of License Upon Change of Ownership

- (1) Unless otherwise provided in the license, a valid license shall run with the land and shall automatically be transferred upon a change of ownership of the affected property within the chain of title of which the license has been recorded. All rights, privileges, obligations, and responsibilities specified in the license shall be transferred to the new landowner upon recording of the changed ownership.
- (2) For transferability of permits issued by the harbormaster for the temporary placement of moorings, floats, and rafts, see 310 CMR 9.07(2)(d).

9.24: Amendments

- (1) Upon written request by the licensee accompanied by appropriate plans, the Department may amend a license and associated written determination to authorize a structural alteration or change in use not defined as substantial in accordance with 310 CMR 9.02, or to delineate a reconfiguration zone within a marina in accordance with 310 CMR 9.39(1)(b), or to renew a term of license in accordance with 310 CMR 9.25(2). A written request may also be made to amend a permit. No license or permit shall be amended unless the project, as modified, complies with the applicable provisions of 310 CMR 9.00 wherever feasible.
- (2) The Department shall review the request for amendment and determine whether the proposed changes are so significant as to require a new license or permit application or are appropriate for consideration of an amendment to the existing license or permit.
- (3) If the Department determines that the proposed changes are appropriate to allow consideration of an amendment, notice shall be provided in accordance with the requirements of 310 CMR 9.13(1), and to any intervenor on the original license application to the maximum reasonable extent.
- (4) The Department may, at its discretion, conduct a public hearing on the request for amendment. Any such hearing shall be conducted in accordance with the requirements of 310 CMR 9.13(3).
- (5) Any person who would otherwise have the right to an adjudicatory hearing pursuant to 310 CMR 9.17 may appeal the issuance of any amendment within 21 days of the date of its issuance, in accordance with the procedures set forth at 310 CMR 9.17.
- (6) The amended license and accompanying plan shall be recorded within 60 days of the date of issuance in accordance with the procedures set forth in 310 CMR 9.18.
- (7) Notwithstanding the procedures for amendment described above, the Department may issue in writing, at the request of the licensee, clarification and corrections regarding any license or permit previously issued.

9.25: Expiration and Renewal

- (1) Expiration.
- (a) Any license, permit, or legislative authorization shall expire as to all work licensed, permitted, or authorized which is not completed within five years of the date thereof, or such other period of time specified therein; provided, however, that for good cause shown the Department may extend, without public hearing or notice, the construction period of the license, permit, or legislative authorization for one or more one year periods upon written request of the licensee or permittee.

## 9.25: continued

- (b) All licenses or permits shall expire upon reaching the term, if any, stated in the license or permit or any extension thereof.
  - (c) Any license shall expire if the fill or structures are abandoned and not used for the purpose for which they were licensed for a period of five consecutive years or more.
- (2) Renewal of Licenses and Permits. A renewal may be granted for a term of years not to exceed that authorized in the original license or permit, in accordance with 310 CMR 9.15, upon written application by the licensee or permittee and in accordance with the procedures for amendments set forth at 310 CMR 9.24.

9.26: Revocation and Nullification

- (1) Revocation.
- (a) Unless otherwise specifically provided by law, the Department may revoke a license or permit for non-compliance with the terms and conditions set forth therein, including any change of use from that expressly authorized in said license or permit or, if no such statement was included, from that reasonably determined by the Department to be implicit therein. Such revocation may not occur until after the Department has given notice of the alleged non-compliance to the licensee or permittee and any person who has filed a written request for such notice with the Department, and after it has afforded them an opportunity for a hearing and a reasonable opportunity to correct said non-compliance.
  - (b) In accordance with the procedures established in 310 CMR 9.26(1)(a), the Department may revoke any license or permit upon a finding that the licensee denies access to project services and facilities in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination. Such a finding shall be made upon a final determination of discrimination, issued by any federal, state or local court or agency with jurisdiction to investigate discrimination issues.
  - (c) Notice of revocation of a license shall be recorded at the Registry of Deeds or Land Court by the Department, in accordance with 310 CMR 9.18.
- (2) Nullification.
- (a) All licenses issued prior to January 1, 1984 are void if:
    1. the license and the accompanying plan were not recorded within one year of date of issuance at the Registry of Deeds for the county or district where the work was to be performed;
    2. there has been an unauthorized substantial change in use; or
    3. there has been an unauthorized substantial structural alteration.
 Notwithstanding the foregoing, no license for filled private tidelands shall be void for unauthorized substantial changes in use or unauthorized substantial structural alterations which occurred prior to January 1, 1984.
  - (b) All licenses issued after January 1, 1984 are void if:
    1. the license and accompanying plan were not recorded within 60 days of date of issuance at the Registry of Deeds for the county or district where the work was to be performed;
    2. there has been an unauthorized substantial change in use; or
    3. there has been an unauthorized substantial structural alteration.

9.27: Removal of Previously Licensed Structures

Upon the nullification, expiration, or revocation of a license, the licensee shall remove all structures authorized in such previous license which are located:

- (1) below the high water mark, unless the Department determines that continued existence of said structures will promote the public interests served by M.G.L. c. 91;

## 9.27: continued

- (2) above the high water mark, if the Department determines that continued existence of said structures will have a significant adverse effect on the public interests served by M.G.L. c. 91.

Such removal shall take place upon written notice to and at the direction of the Department.

9.28: Amnesty

- (1) General. Notwithstanding the provisions of 310 CMR 9.09(2), certain substantive and procedural standards of 310 CMR 9.11 through 9.55 shall not apply to the licensing of existing unauthorized fill or structures provided the Department received an application by October 4, 1996. Furthermore, during the amnesty period the Department may postpone the requirement to obtain a license for certain small-scale water-dependent structures on residential property by issuing an interim approval for said structures. The Department will initiate enforcement action to require the removal or licensing of any such structure pursuant to 310 CMR 9.00 only upon the expiration or revocation of the interim approval or the violation of the terms and conditions thereof. After the close of the amnesty period, the Department will require strict compliance with all provisions of 310 CMR 9.00 and will take enforcement action, including the assessment of penalties if appropriate, to ensure that all unauthorized fill and structures are either licensed or removed.

- (2) Projects Which May Be Authorized Under the Amnesty Program.

- (a) An application for a license under the amnesty program may be submitted only for a project consisting entirely of the continuation in use of existing fill or structures not previously authorized, or for which a grant or license is not presently valid pursuant to 310 CMR 9.00, provided that:

1. said fill or structures have been in use since January 1, 1984, and no unauthorized substantial change in use or substantial structural alteration has occurred since that date; and
2. an application has been filed with the Department by October 4, 1996.

- (b) An application for an interim approval under the amnesty program may be submitted only for a project meeting the criteria of 310 CMR 9.28(2)(a), and which consists entirely of an existing dock, pier, seawall, bulkhead, or other small-scale water dependent structure that is accessory to a single family residence.

- (3) Standards for Applications Under Amnesty Program. For purposes of authorizing any project under the amnesty program, the applicable substantive standards found at 310 CMR 9.07 and 9.20 through 9.27, effective September 15, 1978, shall remain in full force and effect in lieu of the substantive standards found at 310 CMR 9.31 through 9.60.

- (4) Procedures for Applications Under Amnesty Program. For purposes of authorizing projects under the amnesty program, the applicable procedural rules found at 310 CMR 9.11 through 9.30 shall be in effect, except for any time schedule for Department action specified therein, and except as modified in accordance with the following provisions.

- (a) Plans, 310 CMR 9.11(2) and (3): In the case of an application for an interim approval, the plan need not be certified by a Registered Professional Engineer or Registered Land Surveyor if the fill or structure is accurately drawn on a scaled plan in accordance with application instructions issued by the Department.

- (b) Other State and Local Approvals, 310 CMR 9.11(4): In the case of an application for an interim approval, except for any project located in an ACEC, the application need not provide evidence of compliance with the applicable state and local requirements, and the Department shall presume compliance with these requirements unless the Department receives information to the contrary during the public comment period.

- (c) Terms, 310 CMR 9.15: In the case of an application for an amnesty license for a water-dependent use project on Commonwealth tidelands, the license term shall be 99 years unless the Department determines that a shorter term is necessary to protect the public interest in said lands. In the case of an application for an interim approval, said approval shall expire in 30 years unless the affected property is transferred to a new owner for valuable consideration, in which case said approval shall expire one year from the date of recording of the transfer at the Registry of Deeds. An interim approval shall not be renewed upon expiration; further authorization from the Department must be obtained in the form of a license.

## 9.28 continued

- (d) Fees, 310 CMR 9.16(2) through (4): In the case of an application for an amnesty license for a water-dependent use project, the applicable regulations governing tidewater displacement and occupation fees found at 310 CMR 9.08, effective September 15, 1978, shall remain in full force and effect in lieu of the fee regulations found at 310 CMR 9.16(2) through (4). In the case of an application for an interim approval no such fees shall apply. All applications under the amnesty program shall pay the appropriate application fee in accordance with 310 CMR 9.16(1).
- (e) Recording, 310 CMR 9.18: In the case of an application for an interim approval, said approval shall be recorded, without the accompanying plan, at the Registry of Deeds in accordance with 310 CMR 9.18.
- (f) Transfer, 310 CMR 9.23: In the case of an application for an interim approval, said approval shall not run with the land, but shall automatically expire one year from the date of recording of the transfer of the affected property to a new owner for valuable consideration.

9.31: Summary of License and Permit Requirements

- (1) Basic Requirements. No license or permit shall be issued by the Department for any project subject to 310 CMR 9.03 through 9.05 and 9.09 unless said project:
  - (a) includes only fill and structures for uses that have been categorically determined to be eligible for a license, according to the provisions of 310 CMR 9.32;
  - (b) complies with applicable environmental regulatory programs of the Commonwealth, according to the provisions of 310 CMR 9.33;
  - (c) conforms to applicable provisions of a municipal harbor plan, if any, and local zoning law, according to the provisions of 310 CMR 9.34;
  - (d) complies with applicable standards governing the preservation of water-related public rights, according to the provisions of 310 CMR 9.35;
  - (e) complies with applicable standards governing the protection of water-dependent uses, according to the provisions of 310 CMR 9.36;
  - (f) complies with applicable standards governing engineering and construction of structures, according to the provisions of 310 CMR 9.37;
  - (g) complies with applicable standards governing use and design of boating facilities for recreational or commercial vessels, according to the provisions of 310 CMR 9.38 and 9.39;
  - (h) complies with applicable standards governing dredging and disposal of dredge materials, according to the provisions of 310 CMR 9.40; and
  - (i) does not deny access to its services and facilities to any person in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, of the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination.
- (2) Proper Public Purpose Requirement. No license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands. In applying 310 CMR 9.31(2), the Department shall act in accordance with the following provisions.
  - (a) Water-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a water-dependent use project.
  - (b) Nonwater-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a nonwater-dependent use project which:
    - 1. complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 CMR 9.51 through 9.52; and complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53;
    - 2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and
    - 3. if consisting entirely of infrastructure facilities, to which 310 CMR 9.31(2)(b)1. does not apply, complies with the special mitigation and public access standards governing such facilities, according to 310 CMR 9.55.



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- (3) Rebuttal of Presumptions. The presumptions of 310 CMR 9.31(2) may be overcome only if:
  - (a) the basic requirements specified in 310 CMR 9.31(1) have not been met; or

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(b) a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting; in the case of a project for which a final EIR has been prepared, the presumption may be overcome only if such detriment has been identified during the M.G.L. c. 30, §§ 61 through 62H review process.

(4) Requirements for Projects With Special Legislative Authorization. Notwithstanding the provisions of 310 CMR 9.31(1) through (3), the Department shall issue a license or permit where the project comprises fill or structures that have been specifically authorized in a grant or other enactment of the legislature, provided that the Department may prescribe such alterations and conditions as it deems necessary to ensure the project conforms with:

- (a) any requirements contained in the legislative authorization; and
- (b) the standards of 310 CMR 9.31 through 9.60, to the extent consistent with the legislative authorization.

9.32: Categorical Restrictions on Fill and Structures

(1) The Department has determined that in certain situations fill or structures categorically do not meet the statutory tests for approval under M.G.L. c. 91 or are otherwise not in keeping with the purposes of 310 CMR 9.00. Accordingly, a project shall be eligible for a license only if it is restricted to fill or structures which accommodate the uses specified below, within the geographic areas specified below.

(a) Tidelands (Outside of ACECs and DPAs)

- 1. fill or structures for any use on previously filled tidelands;
- 2. fill or structures for water-dependent use located below the high water mark, provided that, in the case of proposed fill, reasonable measures are taken to minimize the amount of fill, including substitution of pile-supported or floating structures and relocation of the use to a position above the high water mark;
- 3. structures to accommodate public pedestrian access on flowed tidelands, provided that it is not reasonable to locate such structures above the high water mark or within the footprint of existing pile-supported structures or pile fields;
- 4. pile-supported structures located below the high water mark for nonwater-dependent uses which replace or modify existing, previously authorized wharves, piers, pile fields, or other filled or pile-supported structures, in accordance with the provisions of 310 CMR 9.51(3)(a) and (b);
- 5. new fill located below the high water mark for accessory or nonwater-dependent use provided that:
  - a. the purpose of such fill is to eliminate irregularities in previously altered portions of the project shoreline; and
  - b. such fill will replace previously authorized fill elsewhere along the project shoreline, on a 1:1 square foot basis and without seaward projection beyond the adjacent shoreline;
- 6. stationary vessels located below the high water mark and proposed for conversion to accessory use or to nonwater-dependent facilities of public accommodation, provided that such vessels:
  - a. do not consist of platform-like floating structures, such as barges, built or modified to serve primarily as support for new buildings; and
  - b. will be licensed for a limited term, in accordance with the provisions of 310 CMR 9.15(1)(d)2..

(b) Tidelands Within Designated Port Areas (DPAs)

- 1. fill or structures for any water-dependent-industrial use, and accessory uses thereto, on previously filled tidelands;
- 2. fill or structures for water-dependent-industrial use on flowed tidelands, provided that, in the case of proposed fill, neither pile-supported nor floating structures are a reasonable alternative;

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3. structures to accommodate public pedestrian access, provided that such structures are located above the high water mark or within the footprint of existing pile-supported structures or pile fields, wherever feasible;
4. structures on filled tidelands to accommodate the following uses on a limited basis:
  - a. a use to be licensed in combination with water-dependent-industrial uses within a marine industrial park, as defined in 310 CMR 9.02; or
  - b. a supporting DPA use, as defined in 310 CMR 9.02; or
  - c. a temporary use, as defined in 310 CMR 9.02.

The use of filled tidelands in a DPA for the above purposes shall also be governed by the provisions of 310 CMR 9.15(1)(d)1. and 310 CMR 9.36(5).

(c) Great Ponds.

1. fill or structures for any use on previously filled lands below the natural high water mark;
2. structures for water-dependent use on submerged lands below the natural high water mark, provided such structures are designed to avoid unnecessary encroachment in the water;
3. fill or structures on submerged lands above the natural high water mark, for uses listed for flowed tidelands in 310 CMR 9.32(1)(a).

(d) Non-Tidal Rivers and Streams (Outside ACECs). Fill or structures for uses below the high water mark, as listed for flowed tidelands in 310 CMR 9.32(1)(a).

(e) Areas of Critical Environmental Concern (ACECs).

1. fill or structures for any use on previously filled tidelands;
2. structures to accommodate public pedestrian access on flowed tidelands, provided that it is not feasible to locate such structures above the high water mark or within the footprint of existing pile-supported structures or pile fields;
3. publicly-owned structures for water-dependent use below the high water mark, provided that such structures are designed to minimize encroachment in the water;
4. privately-owned structures for water-dependent use below the high water mark, provided that:
  - a. the proposed use is not industrial and is located within the footprint of existing previously authorized pile-supported structures, unless an insignificant deviation from said footprint is authorized by the Department in order to protect public health, safety, or the environment; or
  - b. such structures are necessary to accommodate infrastructure facilities, provided that such structures are designed to minimize encroachment in the water; or
  - c. such structures were existing on October 4, 1990, and if a resource management plan for the ACEC has been adopted by the municipality and approved by the Secretary said structures are consistent with said plan; or
  - d. such structures, if built or substantially altered after October 4, 1990, are consistent with a resource management plan adopted by the municipality and approved by the Secretary.

(2) Notwithstanding the provisions of 310 CMR 9.32(1), the Department may license fill or structures necessary for the following uses, provided that reasonable measures are taken to avoid, minimize, and mitigate any encroachment in a waterway:

- (a) shoreline stabilization or the rehabilitation of an existing shore protection structure, irrespective of the uses proposed landward of such fill or structures;
- (b) installation of drainage, ventilation, or utility structures, or placement of minor and incidental fill, necessary to accommodate any replacement, reconstruction or other modification to existing public roadways or existing railroad track and/or rail bed;
- (c) improvement or rehabilitation of existing public roadways or existing railroad track and/or rail bed, provided that any net encroachment with respect to public roadways is limited to widening by less than a single lane, adding shoulders, and upgrading substandard intersections; or
- (d) accessory uses, other than parking, which are clearly subordinate and incidental to a water-dependent use, provided that:
  1. the fill or structures in question are not located in an ACEC, and do not result in any encroachment in the waterway beyond the area occupied by the water-dependent use itself; and

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2. the accessory use cannot reasonably be located above the high water mark, and is not located within a water-dependent use zone.

### 9.33: Environmental Protection Standards

- (1) All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to:
  - (a) Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H and 301 CMR 11.00.
  - (b) Wetlands Protection Act, M.G.L. c. 131, § 40, and 310 CMR 10.00.
  - (c) Wetlands Restriction Acts, M.G.L. c. 130, § 105 and c. 131, § 40A, and 302 CMR 4.00 and 6.00. All projects shall comply with wetland restriction orders recorded pursuant to these statutes.
  - (d) Areas of Critical Environmental Concern, M.G.L. c. 21A, § 2(7) and St. 1974, c. 806, § 40(E), and 301 CMR 12.00.
  - (e) Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 through 53, and 314 CMR 3.00 (Surface Water Discharge Permits - NPDES), 314 CMR 5.00 (Ground Water Discharge Permits), 314 CMR 7.00 (Sewer Extension/Connection Permits), 314 CMR 310 CMR 9.00 (Water Quality Certification), and 310 CMR 15.00 (Subsurface Sewage Disposal Permits - Title 5).
  - (f) Ocean Sanctuaries Act, M.G.L. c. 132A, §§ 13 through 16 and 18, and 302 CMR 5.00. No license or permit shall be issued for any structure or fill that is expressly prohibited in M.G.L. c. 132A, §§ 1 through 16.
  - (g) Marine Fisheries Laws, M.G.L. c. 130, and 322 CMR 1.00.
  - (h) Scenic Rivers Act, M.G.L. c. 21, § 17B, and 302 CMR 3.00.
  - (i) Massachusetts Historical Commission Act, M.G.L. c. 9, §§ 26 through 27C, as amended by St. 1982, c. 152 and St. 1988, c. 254, and 950 CMR 71.00. For projects for which a Project Notification Form must be submitted pursuant to 950 CMR 71.07 the applicant shall file said form with the Massachusetts Historical Commission.
  - (j) Mineral Resources Act, M.G.L. c. 21, §§ 54 through 58, and 310 CMR 29.00.
  - (k) Massachusetts Drinking Water Act, M.G.L. c. 111, §§ 159 through 174A, and 310 CMR 22.00.
  - (l) Underwater Archeological Resources Act, M.G.L. c. 91 and c. 6, §§ 179 and 180, and 312 CMR 2.00.
  - (m) Hazardous Waste Management Act, M.G.L. c. 21C and 310 CMR 30.00.
  - (n) Solid Waste Disposal Act, M.G.L. c. 16, §§ 18 through 24, and 310 CMR 16.00.
  - (o) Air Pollution Act, M.G.L. c. 111, §§ 142A through I and 310 CMR 7.00.
  - (p) State Highway Curb Cuts, M.G.L. c. 81, § 21.
  - (q) Energy Facilities Siting Act, M.G.L. c. 164, §§ 69G through J, and 980 CMR 1.00.
  - (r) Regional land use control statutes, including the Martha's Vineyard Commission Act, St. 1974, c. 637, as amended by St. 1977, c. 831, and the Cape Cod Commission Act, St. 1989, c. 716.
- (2) Where a state or regional agency has authority to issue regulatory approval, issuance of such approval shall be conclusive as to compliance with the regulatory program in question.
- (3) With respect to M.G.L. c. 131, § 40 and 310 CMR 10.00, if the Department has issued a final order of conditions the project shall be presumed to comply with the statute and the final order shall be deemed to be incorporated in the terms of the license or permit, with no additional wetland conditions imposed. If an order of conditions has been issued by the conservation commission and the Department has not taken jurisdiction, the Department shall presume the project complies with state wetland standards, except upon a clear showing of substantial non-compliance with such standards. In that event, the Department shall impose such additional conditions in the license or permit as will make the project substantially comply with state wetlands standards.

9.33: continued

(4) Where a state agency has statutory responsibility but no authority to issue regulatory approval, the Department shall act in accordance with any MOU with said agency governing incorporation of its standards and requirements into waterways licenses and permits. In the absence of an MOU, the Department shall presume that the project complies with the statutes and regulations in question, unless the responsible state agency informs the Department otherwise. In that event, the Department shall consult with the responsible state agency and may adopt any formal recommendations received therefrom, provided such recommendations do not conflict with 310 CMR 9.00 or the purposes of M.G.L. c. 91.

#### 9.34: Conformance with Municipal Zoning And Harbor Plans

(1) Zoning Law. Any project located on private tidelands or filled Commonwealth tidelands must be determined to comply with applicable zoning ordinances and by-laws of the municipality(ies) in which such tidelands are located. The Department shall find this requirement is met upon receipt of written certification issued by the municipal clerk, or by another municipal official responsible for administering said zoning ordinances and by-laws, and signed by the municipal clerk, stating that the activity to be licensed is not in violation of said ordinances and by-laws. Compliance with zoning does not apply to any public service project that is exempted from such requirements by law, including but not limited to action of the Department of Public Utilities pursuant to M.G.L. c. 40A, § 3.

(2) Municipal Harbor Plan.

(a) If the project is located within an area covered by a municipal harbor plan, said project must conform to the provisions of said plan to the degree applicable under plan approval at 301 CMR 23.00. In making this determination the Department shall take into account all relevant information in the public record, and shall act in accordance with the following provisions:

1. the Department shall consult with the planning board or other municipal body with lead responsibility for plan implementation, as appropriate and in accordance with the provisions of 310 CMR 9.11(1). In the event a written recommendation as to plan conformance is submitted by such board or other body, the Department shall presume that the requirement is met or not met in accordance with said recommendation, except upon a clear showing to the contrary and except as otherwise provided in 310 CMR 9.34(2)(a)2.;

2. the Department shall not find the requirement has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be de minimus or unrelated to the purposes of M.G.L. c. 91 or 210 CMR 9.00;

(b) If the project conforms to the municipal harbor plan the Department shall:

1. apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at 301 CMR 23.00 and associated guidelines of CZM;

2. adhere to the greatest reasonable extent to applicable guidance specified in the municipal harbor plan which amplifies any discretionary requirements of 310 CMR 9.00, in accordance with the criteria specified in 301 CMR 23.00 and associated guidelines of CZM;

3. determine that the requirement of 310 CMR 9.54, governing consistency with CZM policies, has been met, if applicable, except upon a written showing by CZM that the project conflicts with CZM policy in effect when the license application was completed, in a manner that was not reasonably foreseeable at the time of plan approval.

4/28/00 (Effective 7/1/00)

310 CMR - 300

9.35: Standards to Preserve Water-Related Public Rights

(1) General. The project shall preserve any rights held by the Commonwealth in trust for the public to use tidelands, Great Ponds and other waterways for lawful purposes; and shall preserve any public rights of access that are associated with such use. In applying this standard the Department shall act in accordance with the provisions of 310 CMR 9.35(2) through (6), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. Further, in assessing the significance of any interference with public rights pursuant to 310 CMR 9.35(2) and(3), the Department shall take into account that the provision of public benefits by certain water-dependent uses may give rise to some unavoidable interference with certain water-related public rights. Such interference may be allowed provided that mitigation is provided to the greatest extent deemed reasonable by the Department, and that the overall public trust in waterways is best served.

(2) Public Rights Applicable to All Waterways.

(a) Navigation -- The project shall not significantly interfere with public rights of navigation which exist in all waterways. Such rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.

1. The Department shall find that the standard is not met in the event a project will:

- a. extend seaward of any state harbor line unless said project is specifically authorized by law or, if not so authorized, is a pipeline, conduit or cable which is entirely embedded in the soil and does not in any part occupy or project into such tidewater beyond the harbor line, provided also that the Department may at any time require any pipeline, conduit or cable to be removed or relocated if channel changes or alterations demand the same, as required by M.G.L. c. 91, § 14;
- b. extend into or over any existing channel such as to impede free passage;
- c. impair any line of sight required for navigation;
- d. require the alteration of an established course of vessels;
- e. interfere with access to adjoining areas by extending substantially beyond the projection of existing structures adjacent to the site;
- f. extend beyond the length required to achieve a safe berthing, where there are no adjacent structures;
- g. generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections;
- h. alter, due to the building of a solid fill structure, tidal action or other currents so as to interfere with the ability to handle vessels;
- i. adversely affect the depth or width of an existing channel; or
- j. impair in any other substantial manner the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities.

The Department may require, among other things, warning devices and other navigation aids as it deems appropriate to reduce interference with navigation.

2. In the event that reducing the length of a structure to avoid significant interference with navigation would create adverse effects on the environment due to dredging, the Department may license or permit a longer structure provided its construction will entail less dredging without producing substantial interference with navigation.

3. In the event the project is located within a Designated Port Area, the Department may authorize fill, structures, or dredging that significantly interferes with navigation by recreational vessels or with shellfishing areas, provided that such activities are for water-dependent-industrial use and that all feasible measures will be taken to mitigate such interference.

(b) Free Passage Over and Through Water -- The project shall not significantly interfere with public rights of free passage over and through the water, which exist in all waterways. Such rights include the right to float on, swim in, or otherwise move freely within the water column without touching the bottom, and, in Commonwealth Tidelands and Great Ponds, to walk on the bottom.

9.35: continued

(c) Access To Town Landings -- The project shall not significantly interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site.

(3) Public Rights Applicable To Tidelands and Great Ponds

(a) Fishing and Fowling - The project shall not significantly interfere with public rights of fishing and fowling which exist in tidelands and Great Ponds. Such rights include the right to seek or take any fish, shellfish, fowl, or floating marine plants, by any legal means, from a vessel or on foot; the right to protect habitat and nutrient source areas in order to have fish, fowl, or marine plants available to be sought and taken; and the natural derivatives thereof. The Department shall find that the standard is not met in the event the project:

1. poses a substantial obstacle to the public's ability to fish or fowl in waterway areas adjacent to the project site; or
2. results in the elimination of a traditional fishing or fowling location used extensively by the public.

(b) On-Foot Passage -- The project shall not significantly interfere with public rights to walk or otherwise pass freely on private tidelands for purposes of fishing, fowling, navigation, and the natural derivatives thereof; and on Commonwealth tidelands and Great Ponds for said purposes and all other lawful activities, including swimming, strolling, and other recreational activities. The Department shall find that the standard is not met if the project does not comply with the following conditions governing public pedestrian access:

1. if the project site includes flowed private tidelands, the project shall allow continuous, on-foot, lateral passage by the public in the exercise of its rights therein, wherever feasible; any pier, wharf, groin, jetty, or other structure on such tidelands shall be designed to minimize interference with such passage, either by maintaining at least a five-foot clearance above the ground along the high water mark or by providing a stairway for the public to pass laterally over such structures; where obstruction of continuous access below the high water mark is unavoidable, the project shall provide alternate lateral passage to the public above said mark in order to mitigate interference with the public right of passage on flowed private tidelands;
2. if the project site includes filled tidelands or Great Ponds, the project shall include reasonable measures to provide on-foot passage on such lands for the public in the exercise of its rights therein, in accordance with the following provisions:
  - a. if the project is a nonwater-dependent use project, said project shall provide public pedestrian access facilities in accordance with the applicable provisions of 310 CMR 9.52 or, for infrastructure facilities, of 310 CMR 9.55;
  - b. if the project is a water-dependent use project on filled Commonwealth tidelands, said project shall provide for public thereon passage by such means as are consistent with the need to avoid undue interference with the water-dependent uses in question; measures which may be appropriate in this regard include, but are not limited to, allowing the public to pass laterally along portions of the project shoreline, or transversely across the site to a point on the project shoreline.

(4) Compensation for Interference With Public Rights in Commonwealth Tidelands and Great Ponds. Any water-dependent use project which includes fill or structures for private use of Commonwealth tidelands or Great Ponds shall provide compensation to the public for interfering with its broad rights to use such lands for any lawful purpose. Such compensation shall be commensurate with the extent of interference caused, and shall take the form of measures deemed appropriate by the Department to promote public use and enjoyment of the water, at a location on or near the project site if feasible. If the project includes a private recreational boating facility, the Department shall apply this standard in accordance with the following provisions:

9.35: continued

(a) for any private recreational boating facility, reasonable arrangements shall be made to accommodate public pedestrian access along or to the water's edge; generally, unless other measures are determined to be more appropriate by the Department, such access shall be provided by establishing, as a condition of the license, a lateral accessway at or near the high water mark wherein the public may pass freely across the seaward end of the property from dawn to dusk;

(b) if the private recreational berthing facility is a marina, additional arrangements shall be made to provide water-related benefits to the public commensurate with the scale of such facility; examples of such benefits include construction of a public boat launching ramp, operation of an ongoing program of community sailing or boating instruction, dedication of a substantial number of berths to public transient use, and provision of public pedestrian facilities beyond those required elsewhere in 310 CMR 9.00.

Nothing in the above provision shall be construed to prevent the licensee from restricting public access to slips, floats, ramps, and other docking facilities where security for recreational vessels is required.

(5) Management of Areas Accessible to the Public. Any project that includes tidelands or Great Ponds accessible to the public, in accordance with any of 310 CMR 9.35(1) through (4), shall provide for long-term management of such areas which achieves effective public use and enjoyment while minimizing conflict with other legitimate interests, including the protection of private property and natural resources. In applying this standard, the Department shall act in accordance with the following provisions.

(a) No limitation on hours of availability or scope of allowed activity, or other substantial restriction, may be placed on said public access except as expressly authorized in the license; reasonable rules and regulations governing public use of such areas may be adopted by the licensee, and may be subject to review and approval by the Department, or its designee, if so provided in the license.

(b) Any project required to provide public access facilities in accordance with 310 CMR 9.35(3)(b)2. or (4)(b), or any other project as deemed appropriate by the Department, shall encourage public patronage of such facilities by placing and maintaining adequate signage at all entryways and at other appropriate locations on the project site; said signage shall:

1. conform to all local laws and regulations and any design guidelines that may be specified by the Department or its designee; and
2. include at least one sign, in a prominent location, which advises the public of its access rights; discloses whatever access-related rules and regulations are in effect, including restrictions on hours of operation, if any; and discloses the license number of the project and a location on the site where a copy of the license may be inspected by the public.

(c) No gates, fences, or other structures may be placed on any areas open to public access in a manner that would impede or discourage the free flow of pedestrian movement thereon; and all pedestrian exterior open spaces shall be open to the public 24 hours a day, unless otherwise authorized in writing by the Department.

(d) The Department may include conditions in a license which restrict public pedestrian access in order to protect public health, safety, or the environment, and shall specify such additional access-related requirements as are deemed appropriate to offset any significant loss of benefits to the public which may be associated with such restrictions.

(6) Limitation on Liability. If a project includes measures to accommodate public pedestrian access in accordance with any provision of 310 CMR 9.33, the licensee shall be considered to be a private landowner who opens land to public recreational use without a fee and who is therefore not liable, pursuant to M.G.L. c. 21, § 17c, for injuries to persons or property due to public use, unless the owner's conduct is willful or reckless.



9.36: Standards to Protect Water-Dependent Uses

(1) General. The project shall preserve the availability and suitability of tidelands, Great Ponds, and other waterways that are in use for water-dependent purposes, or which are reserved primarily as locations for maritime industry or other specific types of water-dependent use. In applying this standard the Department shall act in accordance with 310 CMR 9.36(2) through (5), and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.

(2) Private Access to Littoral or Riparian Property -- The project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in M.G.L. c. 91, § 17. In evaluating whether such interference is caused by a proposed structure, the Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures. In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, where feasible.

(3) The project shall not significantly disrupt any water-dependent use in operation, as of the date of license application, at an off-site location within the proximate vicinity of the project site. The project shall include such mitigation and/or compensation measures as the Department deems appropriate to avoid such disruption.

(4) The project shall not displace any water-dependent use that has occurred on the site within five years prior to the date of license application, except upon a clear showing by the applicant that said use:

- (a) did not take place on a reasonably continuous basis, for a substantial period of time; or
- (b) has been or will be discontinued at the site by the user, for reasons unrelated to the proposed project or as a result of voluntary arrangements with the applicant.

Absent the above showings, the project shall include arrangements determined to be reasonable by the Department for the water-dependent use to be continued at its existing facility, or at a facility at an alternative location having physical attributes, including proximity to the water, and associated business conditions which equal or surpass those of the original facility and as may be identified in a municipal harbor plan, if any. Permanent relocation to an off-site facility may occur in order to accommodate a public service project for which relocation arrangements are governed by law, or if the Department determines that it is not appropriate for the water-dependent use to continue on the site. Otherwise, only temporary relocation may occur as necessary for project construction.

(5) The project shall not include fill or structures for nonwater-dependent or water-dependent, non-industrial uses which preempt water-dependent-industrial use within a Designated Port Area (DPA). In applying this standard the Department shall act in accordance with the following provisions:

- (a) such fill or structures shall not occupy tidelands which the Department determines are necessary to accommodate a competing party who intends to develop such tidelands for water-dependent industrial use, provided written notice of such party's intention is submitted to the Department prior to the close of the public comment period on the license application; such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the competing project would promote water-dependent-industrial use of the DPA to a greater degree than the proposed project, and that the competing party:
  - 1. is a state or local government agency, or is a maritime business or other organization with the expertise, experience, and financial ability to implement the competing project;
  - 2. has prepared detailed development plans for the competing project, including appropriate feasibility studies;
  - 3. has tendered an offer to purchase title or other rights to the tidelands in question, at fair market value for water-dependent-industrial use; and

## 9.36: continued

4. has proposed waterways license conditions or other arrangements which will restrict the tidelands in question to the uses contained in the competing projects for a period of time deemed appropriate by the Department;
- (b) reasonable arrangements shall be made to prevent commitments of space or facilities that would significantly discourage present or future water-dependent-industrial activity on the project site or elsewhere in the DPA; such arrangements shall include, but are not limited to, the following:
  1. in general, no structures shall be built or altered which cannot be subsequently removed or converted to water-dependent-industrial use with relative ease; otherwise, the Department may impose, as a condition of the license, a requirement for removal or restoration of such structures upon expiration of the license;
  2. nonwater-dependent uses shall not be located in any spaces or facilities with attributes that are necessary to maintain the utility of the project site for prospective water-dependent-industrial use, especially that for which it is among the most suitable in the harbor in question; at a minimum, such nonwater-dependent uses shall not occur in new structures within the water-dependent use zone;
  3. within a marine industrial park, conditions governing the duration of tenancy or other mechanisms must be established to ensure that nonwater-dependent activity occurs in a manner that preserves adequate flexibility over time for the park to accommodate water-dependent-industrial uses; at a minimum, reasonable steps shall be taken to assign a priority for said uses to occupy spaces or facilities as they become available in the future;
  4. in the case of supporting DPA use, conditions governing the nature and extent of operational or economic support must be established to ensure that such support will be effectively provided to water-dependent-industrial uses.

9.37: Engineering and Construction Standards

- (1) All fill and structures shall be designed and constructed in a manner that:
  - (a) is structurally sound, as certified by a Registered Professional Engineer;
  - (b) complies with applicable state requirements for construction in flood plains, in accordance with the State Building Code, 780 CMR 744.00 and as hereafter may be amended, and will not pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures, if damaged or destroyed in a storm; and
  - (c) does not unreasonably restrict the ability to dredge any channels.
- (2) In the case of a project within a flood zone, the project shall comply with the following requirements:
  - (a) In coastal high hazard areas as defined in 310 CMR 9.02, new or expanded buildings for residential use shall not be located seaward of the high water mark.
  - (b) New buildings for nonwater-dependent use intended for human occupancy shall be designed and constructed to:
    1. withstand the wind and wave forces associated with the statistical 100-year frequency storm event; and
    2. incorporate projected sea level rise during the design life of the buildings; at a minimum, such projections shall be based on historical rates of increase in sea level in New England coastal areas.
- (3) Projects with coastal or shoreline engineering structures shall comply with the following:
  - (a) any seawall, bulkhead, or revetment shall be located landward of the high water mark unless it must lie below the high water mark to permit proper tieback placement, to obtain a stable slope on bank areas, or to be compatible with abutting seawalls, bulkheads, or revetments in terms of design, size, function, and materials, or unless it is associated with new fill permitted according to the provisions of 310 CMR 9.32;

9.37: continued

- (b) any breakwater or similar structure designed to dissipate or otherwise reduce wave energy or to interfere with current flow shall not:
    - 1. cause or contribute to water stagnancy;
    - 2. reduce the ability of adjacent water bodies to flush adequately; or
    - 3. cause or contribute to sedimentation problems in adjacent or nearby navigation channels, anchorages, or wetland resource areas, or cause increased erosion to inland or coastal beaches, banks, or other wetland resource areas;
  - (c) in evaluating coastal or shoreline engineering structures, the Department shall require non-structural alternatives where feasible;
  - (d) the Department shall evaluate coastal or shoreline engineering structures for compatibility with abutting coastal or shoreline engineering structures in terms of design, size, function, and materials;
  - (e) if the Department finds significant adverse effects on the project site or adjacent or downcoast and downstream areas after construction of any coastal or shoreline engineering structure, the Department may, after an opportunity for a hearing, require modification of said structure the cost of which may not exceed 25% of the replacement cost of said structure, or may require the removal of said structure; 310 CMR 9.37(3)(e) shall be specifically stated in the license.
- (4) Pipelines and conduits and their valves and protrusions shall be buried so that they will not present a hazard to navigation; will be adequately protected from scouring; will not be uncovered by sediment transport; and will not present a hazard or obstruction to fishing gear. Bottom contours shall be restored after burial. Pipelines carrying hazardous substances (*e.g.*, oil) shall also be protected from anchor dragging and fish trawls. When the burial of pipelines, conduits, valves, and protrusions is not feasible, equivalent protection shall be provided by shrouding or other means.

#### 9.38: Use Standards for Recreational Boating Facilities

- (1) Public Recreational Boating Facilities. Any project that includes a public recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to ensure patronage of such facility by the general public. In applying this standard the Department shall act in accordance with the following provisions:
- (a) all vacant berths shall be assigned in a fair and equitable manner to the public patrons of said facility, by means of a waiting list or other comparably unbiased method; nothing in this provision shall be construed to prevent berthing assignments based on vessel characteristics, or the offer of first refusal rights to existing patrons of the facility who wish to relocate to a vacant berth;
  - (b) any contract or other agreement for exclusive use of berths at said facility shall have a maximum term of one year, and may be renewable upon each expiration for an additional period of up to one year;
  - (c) reasonable arrangements shall be made to accommodate transient boaters, including, at a minimum, a procedure for making any berth available for transient use during periods of vacancy in excess of 24 hours;
  - (d) all exterior pedestrian facilities on the project site shall be open to the general public, except where access restrictions are necessary in order to avoid significant interference with the operation of the facility or to maintain security at slips, ramps, floats, and other docking facilities; any such access restrictions shall be stated in the license.
- (2) Private Recreational Boating Facilities.
- (a) Any project that includes a private recreational boating facility, any portion of which is located on Commonwealth tidelands or Great Ponds, shall include measures to avoid undue privatization in the patronage of said facility. In applying this standard, the Department shall act in accordance with the following provisions:

## 9.38: continued

1. no berth in a marina shall be assigned pursuant to any contract or other agreement that makes use of the berth contingent upon ownership or occupancy of a residence or other nonwater-dependent facility of private tenancy;
2. no berth in a marina shall be assigned pursuant to a contract or other agreement for exclusive use with a maximum term that exceeds one year, unless:
  - a. for existing marinas, the lease agreement, master lease agreement or notice thereof for such berths was recorded at the Registry of Deeds prior to July 6, 1990 in which event all berths subject to such agreement shall be exempt from the provisions of 310 CMR 9.38(2)(b); or
  - b. for new marinas or berths in an existing marina not grandfathered pursuant to 310 CMR 9.38(2)(a), the following conditions are met:
    - i. said marina is located on tidelands outside of Designated Port Area;
    - ii. the Department expressly authorizes the assignment of long-term exclusive use of such berths in the license, and the license includes a condition requiring written notification to any assignee that said license does not convey ownership of Commonwealth tidelands;
    - iii. the number of berths authorized in the license does not exceed 50% of the total berths in said marina; and
    - iv. said marina provides water-related public benefits commensurate with the degree of privatization, as deemed appropriate by the Department.
- (b) No project shall include a private recreational boating facility with fewer than ten berths on Commonwealth tidelands or Great Ponds, if the Department receives written certification from the municipal official or planning board of the municipality in which the project is located that such facility does not conform to a formal, areawide policy or plan which establishes municipal priorities among competing uses of the waterway, unless the Department determines that such certification:
  1. is arbitrary, capricious, or an abuse of discretion; or
  2. conflicts with an overriding state, regional, or federal interest.

9.39: Standards for Marinas, Boatyards, and Boat Ramps(1) Marinas.

- (a) Design Standards for Marinas -- Any project that includes a new marina, or any expansion thereof to ten or more berths greater than the number of berths existing on the effective date of 310 CMR 9.00, shall comply with the following design requirements:
  1. all docking facilities, including passageways, shall be certified to be structurally sound by a registered professional engineer;
  2. safe and unobstructed navigational ingress and egress to docking facilities shall be provided;
  3. sanitary facilities shall be provided, including:
    - a. an adequate number of restrooms and refuse receptacles appropriate for the number of berths at the marina; in general, there should be one toilet fixture per sex for every 50 berths, and refuse receptacles at every gangway and restroom area; and
    - b. sewage pumpout facilities shall be provided as appropriate based on the number of berths and type of vessels at the marina, the availability of such facilities nearby, and environmental considerations including the water circulation patterns of the waterway and the proximity of shellfish resources; in general, there should be a sewage pumpout facility for marinas with more than 50 berths, or as otherwise specified in a municipal harbor plan; documentation shall be provided showing compliance with local, state, and federal requirements for said facilities;
  4. any utility services provided at the marina shall be constructed and maintained in compliance with all applicable local and state requirements;
  5. all lighting at the marina shall be designed to minimize interference with navigation by reflection, glare, or interference with aids to navigation;
  6. if the applicant proposes to provide facilities for storage, pumping or conveyance of petroleum fuels, the following information shall also be provided:

9.39: continued

- a. a detailed description and site location plan for marine related facilities necessary for the pumping, conveyance and storage of any petroleum products;
- b. a list of methods and equipment to be used for containment and clean-up of any petroleum fuels accidentally discharged into the water, including minor spills during routine operations; and a detailed contingency plan for major spills;
- c. documentation showing compliance with applicable local, state and federal requirements for said facilities.

(b) Reconfiguration of Docking Facilities in a Marina -- In a license or license amendment, the Department may delineate a zone within a marina for purposes of future reconfiguration of existing, licensed docking facilities, including pile-held or bottom-anchored floating walkways and finger piers, floats, and mooring piles. Such reconfiguration may proceed upon written approval by the Department, but without further licensing action if:

- 1. the licensee submits to the Department a written request and plan for reconfiguration which does not extend beyond the delineated zone, and which does not result in an increase in the area of waterway occupied from that which was originally licensed;
- 2. The licensee submits to the Department a statement affirming that the material submitted to the Department under 310 CMR 9.39(1)(b)1. has, at the time of such submittal, also been sent to the harbormaster of the affected municipality or, if the municipality has no harbormaster, to the municipal official, and that said harbormaster or municipal official has been informed that he has 30 days to register any objections to the proposed reconfiguration plan with the Department;
- 3. all other applicable permits have been obtained, including any required approval under M.G.L. c. 131, § 40 and 310 CMR 10.00.

The Department shall act upon any such request within 60 days of receipt.

(2) Boatyards. The license application for any boatyard or expansion thereof shall indicate on the license plan that the following facilities and information will be provided:

- (a) adequate oil, grease, sediment, and paint traps and other appropriate measures used to contain by-products of boat service, repair and construction to prevent them from discharging into the adjacent waterway;
- (b) boat out-hauling and launching facilities which have been certified as structurally sound by a registered professional engineer; and
- (c) documentation showing compliance with applicable local, state and federal requirements for the use and storage of hazardous materials.

(3) Boat Launching Ramps. The license application for any boat launching ramp for public use, or any expansion thereof, shall indicate on the license plan that the following facilities will be provided, to a degree deemed appropriate by the Department:

- (a) turning areas to facilitate the launching and retrieval of boats to or from the water;
- (b) parking areas for vehicles and boat trailers;
- (c) permanent or temporary sanitary facilities for boaters using the launching ramp, as necessary in light of anticipated water quality or other environmental concerns and maintenance considerations;
- (d) ramps constructed, where possible, at an angle no greater than 15% from the horizontal; where upland modification is necessary, the slope grade should be created, if possible, by cutting back into the upland; ramps should be approximately even with beach or upland grade elevations; and ramps should extend a sufficient distance inland to prevent washout at the inland edge and where possible should extend a minimum of five feet beyond the low water mark; and
- (e) sufficient access facilities and water depths so as to provide safe navigational ingress and egress; this may include adjacent catwalks, tie-off pilings, or access piers and suitable associated water area for staging of boat launching and retrieval; water depths at the launching area of the ramp should be the minimum depth necessary to accommodate the types of boats which will use the facility.

9.40: Standards For Dredging and Dredged Material Disposal

Any project that includes dredging or dredged material disposal shall comply with the following requirements:

(1) Limitations on Dredging and Disposal Activity

(a) The project shall not include any dredging of channels, mooring basins, or turnaround basins to a mean low water depth greater than 20 feet, unless said project:

1. is located within a Designated Port Area; or
2. serves a commercial navigation purpose of state, regional, or federal significance, and cannot reasonably be located in a Designated Port Area.

(b) If the project is located in an ACEC, the project shall not include any of the following activities:

1. improvement dredging, except for the sole purpose of fisheries or wildlife enhancement;
2. dredged material disposal, except for the sole purpose of beach nourishment, dune construction or stabilization with proper vegetative cover, or the enhancement of fishery or wildlife resources.

(2) Resource Protection Requirements

(a) The design and timing of dredging and dredged material disposal activity shall be such as to avoid interference with anadromous/catadromous fish runs. At a minimum, no such activity shall occur in such areas between March 15th and June 15th of any year, except upon a determination by the Division of Marine Fisheries, pursuant to M.G.L. c. 130, § 19, that such an activity will not obstruct or hinder the passage of fish.

(b) The design and timing of dredging and dredged material disposal activity shall be such as to minimize adverse impacts on shellfish beds, fishery resource areas, and submerged aquatic vegetation. The Department may consult with the Department of Fisheries, Wildlife, and Environmental Law Enforcement or the natural resource officer of the municipality regarding the assessment of such impacts.

(3) Operational Requirements for Dredging

(a) The extent of dredging shall not exceed that reasonably necessary to accommodate the navigational requirements of the project and provide adequate water circulation.

(b) The shoreward extent of dredging shall be a sufficient distance from the edge of adjacent marshes to avoid slumping. In general, for improvement dredging projects the edge of the dredging footprint, including any side cuts, should be at least 25 feet from any marsh boundary. In areas where significant wake or wash will be generated by vessel traffic, increased setbacks may be incorporated based on appropriate design calculations.

(c) In general, no basin, canal, or channel shall be dredged deeper than the main channel to which it is connected.

(d) To the maximum reasonable extent, basins shall have wide openings and short entrance channels to promote tidal exchange within the basin.

(e) In general, hydraulic dredging shall be favored over mechanical methods, except when open water disposal of fine grained material is proposed.

(4) Operational Requirements for Dredged Material Disposal

(a) Where determined to be reasonable by the Department, clean dredged material shall be disposed of in a manner that serves the purpose of beach nourishment, in accordance with the following provisions:

1. in the case of a publicly-funded dredging project, such material shall be placed on publicly-owned eroding beaches; if no appropriate site can be located, private eroding beaches may be nourished if easements for public access below the existing high water mark can be secured by the applicant from the owner of the beach to be nourished;
2. in the case of a privately-funded dredging project, such material may be placed on any eroding beach.

(b) In the event ocean disposal of dredged material is determined to be appropriate by the Department, the licensee or permittee shall:

9.40: continued

1. publish in the *Notice to Mariners* the date, time, and proposed route of all ocean disposal activities and the coordinates of the ocean disposal site, as deemed appropriate by the U.S. Coast Guard;
  2. ensure that transport vessels are not loaded beyond capacity; are equipped with sudden, high volume release mechanisms; and are at a complete stop when the material is released; and
  3. ensure that disposal occurs within the boundaries of an approved or otherwise formally designated ocean disposal site; and that the discharge location is marked during disposal operations by a buoy equipped with a flashing light and radar reflectors which allow it to be located under variable sea/weather conditions.
- (5) Supervision of Dredging and Disposal Activity.
- (a) The licensee or permittee shall inform the Department in writing at least three days before commencing any authorized dredging or dredged material disposal.
  - (b) The licensee or permittee shall provide, at his/her expense, a dredging inspector approved by the Department who shall accompany the dredged material while in transit and during discharges, either upon the scows containing the dredged material or upon the boat towing them, for the following activities:
    1. any offshore disposal;
    2. any onshore disposal of dredged material greater than 10,000 cubic yards; or
    3. the disposal of materials defined by the Department as potentially degrading or hazardous.
  - (c) The name, address, and qualifications of the dredging inspector shall be submitted to the Department as part of the license or permit application for approval.
  - (d) Within 30 days after the completion of the dredging, a report shall be submitted to the Department certified by the dredging inspector, including daily logs of the dredging operation indicating volume of dredged material, point of origin, point of destination, and other appropriate information.

#### 9.51: Conservation of Capacity for Water-Dependent Use

A nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use. In applying this standard, the Department shall take into account any relevant information concerning the utility or adaptability of the site for present or future water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall adhere to the greatest reasonable extent to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with the following provisions.

- (1) If the project includes nonwater-dependent facilities of private tenancy, such facilities must be developed in a manner that prevents significant conflict in operation between their users and those of any water-dependent facility which reasonably can be expected to locate on or near the project site. Characteristics of the respective facilities that may give rise to such user conflict include, but are not limited to:
  - (a) presence of noise and odors;
  - (b) type of equipment and accessory services;
  - (c) hours of operation and spatial patterns of activity;
  - (d) traffic flows and parking needs;
  - (e) size and composition of user groups;
  - (f) privacy and security requirements;
  - (g) requirements for public infrastructure.
- (2) If the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site. Aspects of built form that may give rise to design incompatibility include, but are not limited to:

## 9.51: continued

- (a) the total surface coverage by buildings and other permanent structures, insofar as it may affect the amount of open space where flexibility to serve water-dependent purposes will be retained;
  - (b) the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity;
  - (c) the scale of buildings and other permanent structures, insofar as it may affect wind, shadow, and other conditions of the ground level environment that may affect users of water-dependent facilities; and
  - (d) the landscape design of exterior open spaces, insofar as it may affect the attainment of effective pedestrian and vehicular circulation within and to areas of water-dependent activity.
- (3) The Department shall find that the standard is not met if the project does not comply with the following minimum conditions which, in the absence of a municipal harbor plan which promotes the policy objectives stated herein with comparable or greater effectiveness, are necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use:
- (a) new pile-supported structures for nonwater-dependent use shall not extend beyond the footprint of existing, previously authorized pile-supported structures or pile fields, except where no further seaward projection occurs and the area of open water lost due to such extension is replaced, on at least a 1:1 square foot basis, through the removal of existing, previously authorized fill or pile-supported structures or pile fields elsewhere on the project site; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the on-site replacement requirement if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative replacement requirements which ensure that no net loss of open water will occur for nonwater-dependent purposes, in order to maintain or improve the overall capacity of the state's waterways to accommodate public use in the exercise of water-related rights, as appropriate for the harbor in question;
  - (b) nonwater-dependent facilities of private tenancy shall not be located on any pile-supported structures on flowed tidelands, nor at the ground level of any filled tidelands within 100 feet of a project shoreline; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above use limitations if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative limitations and other requirements which ensure that no significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent purposes, in order that such areas will be generally free of uses that conflict with, preempt, or otherwise discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question;
  - (c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:
    - 1. along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and
    - 2. along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet; and
    - 3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet.



9.51: continued

As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standards if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative setback distances and other requirements which ensure that new buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space along the water's edge will be devoted exclusively to water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

(d) at least one square foot of the project site at ground level, exclusive of areas lying seaward of a project shoreline, shall be reserved as open space for every square foot of tideland area within the combined footprint of buildings containing nonwater-dependent use on the project site; in the event this requirement cannot be met by a project involving only the renovation or reuse of existing buildings, ground level open space shall be provided to the maximum reasonable extent; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standard if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative site coverage ratios and other requirements which ensure that, in general, buildings for nonwater-dependent use will be relatively condensed in footprint, in order that an amount of open space commensurate with that occupied by such buildings will be available to accommodate water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

(e) new or expanded buildings for nonwater-dependent use shall not exceed 55 feet in height if located over the water or within 100 feet landward of the high water mark; at greater landward distances, the height of such buildings shall not exceed 55 feet plus one-half foot for every additional foot of separation from the high water mark; as provided in 310 CMR 9.34(2)(b)1., the Department shall waive such height limits if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements which ensure that, in general, such buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question;

(4) the requirements of 310 CMR 9.51(1) through (3), shall also apply in the event a nonwater-dependent use project is located on a Great Pond;

(5) the requirements of 310 CMR 9.51(3), shall not apply to projects in Designated Port Areas involving temporary uses, supporting DPA uses that are industrial, and marine industrial parks.

9.52: Utilization of Shoreline for Water-Dependent Purposes

A nonwater-dependent use project that includes fill or structures on any tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands. In applying this standard, the Department shall take into account any relevant information concerning the capacity of the project site to serve such water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.. Except as necessary to protect public health, safety, or the environment, the Department shall act in accordance with the following provisions.

(1) In the event the project site includes a water-dependent use zone, the project shall include at least the following:

(a) one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site, given the nature of the project, conditions of the water body on which it is located, and other relevant circumstances; in making this determination, the Department shall give particular consideration to:

1. facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas, fishing piers, waterfront boardwalks and esplanades for public recreation, and water-based public facilities as listed in 310 CMR 9.53(2)(a); and
2. facilities for which a demonstrated need exists in the harbor in question and for which other suitable locations are not reasonably available; and

(b) a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies) provided in 310 CMR 9.52(1)(a); at a minimum, such network shall consist of:

1. walkways and related facilities along the entire length of the water-dependent use zone; wherever feasible, such walkways shall be adjacent to the project shoreline and, except as otherwise provided in a municipal harbor plan, shall be no less than ten feet in width; and
2. appropriate connecting walkways that allow pedestrians to approach the shoreline walkways from public ways or other public access facilities to which any tidelands on the project site are adjacent. Such pedestrian access network shall be available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of public rights at the project site.

(2) In the event the project site does not include a water-dependent use zone, the project shall provide connecting public walkways or other public pedestrian facilities as necessary to ensure that sites containing water-dependent use zones will not be isolated from, or poorly linked with, public ways or other public access facilities to which any tidelands on the project site are adjacent.

(3) The requirements of 310 CMR 9.52(1) and (2), shall also apply in the event a nonwater-dependent use project is located on a Great Pond.

9.53: Activation of Commonwealth Tidelands for Public Use

A nonwater-dependent use project that includes fill or structures on Commonwealth tidelands, except in Designated Port Areas, must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes. In applying this standard, the Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with 310 CMR 9.53(1)through (4).

## 9.53: continued

(1) The project shall not include fill or structures for nonwater-dependent use of Commonwealth tidelands which the Department determines are necessary to accommodate a public agency which intends to pursue a water-dependent use project on such lands, provided written notice of such agency's intention is submitted to the Department prior to the close of the public comment period on the license application. Such determination shall be based upon a clear showing, within a period of time deemed reasonable by the Department, that the agency's project has met the criteria of 310 CMR 9.36(5)(a)2. through 4.

(2) The project shall attract and maintain substantial public activity on the site on a year-round basis, through the provision of water-related public benefits of a kind and to a degree that is appropriate for the site, given the nature of the project, conditions of the waterbody on which it is located, and other relevant circumstances. In making this determination, the Department shall act in accordance with 310 CMR 9.53(2)(a) through (e):

(a) in the event the project site includes a water-dependent use zone, at least one facility utilizing the shoreline in accordance with the provisions of 310 CMR 9.52(1)(a) must also promote water-based public activity; such facilities include but are not limited to ferries, cruise ships, water shuttles, public landings and swimming/fishing areas, excursion/charter/rental docks, and community sailing centers;

(b) the project shall include exterior open spaces for active or passive public recreation, examples of which are parks, plazas, and observation areas; such open spaces shall be located at or near the water to the maximum reasonable extent, unless otherwise deemed appropriate by the Department, and shall include related pedestrian amenities such as lighting and seating facilities, restrooms and trash receptacles, children's play areas, and safety ladders along shoreline walkways, as appropriate; such facilities shall be sized in accordance with 310 CMR 9.53(2)(b)1. through 2.:

1. the amount of such space shall be at least equal to the square footage of all Commonwealth tidelands on the project site landward of a project shoreline and not within the footprint of buildings, less any space deemed necessary by the Department to accommodate other water-dependent uses; the Department may also allow a portion of such open space to be devoted to public ways and/or surface parking open to the public, including users of the facility of public accommodation, provided that below grade or structured parking is not a reasonable alternative and that the open space devoted to public vehicular use does not exceed that devoted to public pedestrian use;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.53(2)(b)1., if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative requirements for public outdoor recreation facilities that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner;

(c) the project shall devote interior space to facilities of public accommodation, other than public parking, with special consideration given to facilities that enhance the destination value of the waterfront by serving significant community needs, attracting a broad range of people, or providing innovative amenities for public use; such public interior space shall be located at the ground level of all buildings containing nonwater-dependent facilities of private tenancy, unless the Department determines that an alternative location would more effectively promote public use and enjoyment of the project site or is appropriate to make ground level space available for water-dependent use or upper floor accessory services; the extent of such interior space shall be determined in accordance with 310 CMR 9.53(2)(c)1. through 2.:

1. such space shall be at least equal in amount to the square footage of all Commonwealth tidelands on the project site within the footprint of buildings containing nonwater-dependent facilities of private tenancy;

2. as provided in 310 CMR 9.34(2)(b)1., the Department shall waive the requirements of 310 CMR 9.53(2)(c)1., if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative requirements for interior facilities of public accommodation that will establish the project site as a year-round locus of public activity in a comparable and highly effective manner;

9.53: continued

- (d) the project shall include a management plan for all on-site facilities offering water-related benefits to the public, to ensure that the quantity and quality of such benefits will be effectively sustained; management elements which may be covered by the plan include, but are not limited to, signage, maintenance, hours and rules of operation, organizational arrangements and responsibilities, pricing, financing, and procedures for resolving use conflicts; if deemed appropriate, the Department may require the applicant to offer to the public, in the form of an easement, an enforceable right of access to or use of a proposed water-dependent facility of public accommodation;
  - (e) in the event that water-related public benefits which can reasonably be provided on-site are not appropriate or sufficient, the Department may consider measures funded or otherwise taken by the applicant to provide such benefits elsewhere in the harbor or otherwise in the vicinity of the project site.
- (3) The project shall promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits. In making this determination, the Department shall act in accordance with 310 CMR 9.53(3)(a) through (d):
- (a) the Department shall take into account any guidance forthcoming from a state, federal, regional, or municipal agency as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation.
  - (b) the Department shall act in accordance with the written recommendation of the Secretary of any state Executive Office in whose area of agency or program jurisdiction the proposed project falls, provided that said recommendation is made pursuant to an MOU or other written agreement with the Department as to the manner and extent to which the nonwater-related policies, plans, and programs of said Executive Office will be promoted in relation to water-related public interests.
  - (c) the Department shall give primary consideration to the implementation of policies, plans, or programs that:
    - 1. have been officially adopted by statute, regulation, or other formal instrument of legislative or administrative action; and
    - 2. complement measures taken by the project to serve water-related public purposes; examples of such complementary policies include the improvement of public transportation systems in order to foster ease of public movement to and from waterfront facilities, and the inclusion of affordable housing in residential development in order to make waterfront tenancy and access available to a broader segment of the public than would be the case under prevailing market conditions;
  - (d) the Department shall consider only those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical. Examples of direct public benefits include meeting a community need for mixed-income residential development, creating a large number of permanent jobs on-site, and reutilizing idle waterfront properties. Corresponding examples of indirect public benefits include increasing the general supply of market-rate housing, improving overall economic conditions, and expanding the property tax base of a municipality.
- (4) In the event a nonwater-dependent use project is located on Great Ponds, the Department shall apply the provisions of 310 CMR 9.53(1) through (3), to the portion of the project site lying below the natural low water mark.

9.54: Consistency with Coastal Zone Management Policies

Nonwater-dependent use projects located in the coastal zone shall be consistent with all policies of the Massachusetts Coastal Zone Management Program, pursuant to 301 CMR 20.05(3), as may be amended hereafter. In applying this standard, the Department shall consider any written statement submitted by the Coastal Zone Management Office pursuant to 310 CMR 9.13(2), and shall act in accordance with the following provisions.

(1) If the Department concurs with the conclusions and recommendations of CZM, said written statement shall be adopted as part of the written determination on license application.

(2) If the Department disagrees with any conclusions or recommendations of CZM and the disagreement cannot be resolved through routine consultation, the assistance and direction of the Secretary shall be sought in accordance with the provisions of M.G.L. c. 21A, § 4, governing mediation of administrative and jurisdictional conflicts within EOE. If the disagreement is not eliminated through such mediation, the Department shall include in the written determination an explanation of the specific basis for its final decision on consistency with CZM policies.

If the project site is within an area covered by a municipal harbor plan, the Department shall presume this standard is met, in accordance with the provisions of 310 CMR 9.34(2)(b)3.

9.55: Standards for Nonwater-Dependent Infrastructure Facilities

(1) The requirements of 310 CMR 9.51 through 9.53, shall not apply to nonwater-dependent use projects consisting of infrastructure facilities on tidelands or Great Ponds. Such projects shall include mitigation and/or compensation measures as deemed appropriate by the Department to ensure that all feasible measures are taken to avoid or minimize detriments to the water-related interests of the public. Such interests include, but are not limited to:

- (a) the protection of maritime commerce, industry, recreation and associated public access;
- (b) the protection, restoration, and enhancement of living marine resources;
- (c) the attainment of water quality goals;
- (d) the reduction of flood and erosion-related hazards on lands subject to the 100-year storm event or to sea level rise, especially those in damage-prone or natural buffer areas;
- (e) the protection and enhancement of public views and visual quality in the natural and built environment of the shoreline;
- (f) the preservation of historic sites and districts, archaeological sites, and other significant cultural resources near waterways.

(2) All nonwater-dependent use projects consisting of infrastructure facilities on tidelands or Great Ponds shall take reasonable measures to provide open spaces for active or passive recreation at or near the water's edge, wherever appropriate. Such measures may be provided by any means consistent with the need to avoid undue interference with the infrastructure facilities in question, and to protect public health, safety, or the environment.

## REGULATORY AUTHORITY

310 CMR 9.00: M.G.L. c. 21A, §§ 2, 4, 8, and 14; c. 91, §§ 1 through 63; c. 91A, § 18.

**PREFACE TO 1990 WATERWAYS REGULATIONS AMENDMENTS FOR IMPLEMENTATION OF MGL  
CHAPTER 91  
(310 CMR 9.00)**

**Introduction and Summary**

Massachusetts' principal tool for protection and promotion of active water-dependent use of its tidelands and other waterways is M.G.L. Chapter 91, the waterways licensing program first established formally in 1866, but dating back to the earliest days of the Massachusetts Bay Colony. The oldest program of its kind in the nation, it regulates activities in both coastal and inland areas, including construction, dredging and filling in tidelands, great ponds, and certain rivers and streams.

Chapter 91 is administered on behalf of the citizens of the Commonwealth by the Wetlands and Waterways Division of the Massachusetts Department of Environmental Protection (formerly the Department of Environmental Quality Engineering.) Through Chapter 91, the Commonwealth seeks to preserve and protect the rights of the public in tidelands by ensuring that such tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose. More specifically, the basic goals of the Waterways Regulation Program are to:

- Protect and promote tidelands as a workplace for commercial fishing, shipping, passenger transportation, boat building and repair, marinas and other activities for which proximity to the water is either essential or highly advantageous.
- Preserve pedestrian access along the water's edge for fishing, fowling, and navigation, and, in return for permission to develop non-water-dependent projects on Commonwealth tidelands, provide facilities to enhance public use and enjoyment of the water.
- Protect Areas of Critical Environmental Concern and other ecologically sensitive areas from unnecessary encroachment by fill and structures.
- Support public and private efforts to revitalize unproductive property along urban waterfronts, in a manner that promotes public use and enjoyment of the water.
- Encourage the development of city and town harbor plans to dovetail local waterfront and use interest with the Commonwealth's statewide concerns.

Chapter 91 was amended in 1983 by the Massachusetts Legislature to strengthen its ability to provide stewardship for tidelands presently and formerly under water. It was amended again in 1986 and in 1987 and 1989 draft regulations were proposed for public review with two series of hearings throughout the State. Those proposed rules received extensive comment, and following thorough review, the revised Chapter 91 rules are being promulgated this year to take effect on October 4, 1990.

## **Background on Public Trust in Tidelands**

The idea that tidelands are held by the government for the benefit of all people dates back to the beginning of western civilization. Ancient Roman Law provided:

By natural law itself, these things are the common property of all: air, running water, the sea and with it the shore of the sea.

### **Institutes of Justinian, 2.1.1 (circa 550 A.D.)**

The public trust doctrine was transplanted with the British colonists and was first codified in this country in the Massachusetts Colonial Ordinances of 1641-1647, which proclaimed the public's rights in tidelands and great ponds. However, in order to encourage the private construction of piers and wharves necessary for maritime commerce, the case-poor colonial government granted to the upland owners the land between the high and low water marks, subject to the public's rights to fish, fowl (hunting for waterfowl), and navigate in those tidelands.

More recently, in 1979 the Massachusetts Supreme Judicial Court declared that the public trust rights survive even in filled tidelands, which may be held by private parties but remain subject to an implied condition that they must continue to serve a public purpose, Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629 (1979). The 1983 amendments to Chapter 91 were enacted to promote more fully the public's rights in those filled lands, as well as tidelands presently under water.

### **Where Does Chapter 91 Apply?**

Chapter 91 applies in tidelands, great ponds, and along certain rivers and streams. Uplands, those areas above mean high water which were never filled, are not covered by Chapter 91. There are two basic types of tidelands:

- Private Tidelands are those areas between mean high and mean low water which are usually privately owned, but on which the Commonwealth reserves and protects public rights of fishing, fowling and navigation.
- Commonwealth Tidelands are all lands below the low water mark, extending seaward out to the limit of state jurisdiction (three miles) which are owned by the Commonwealth or held by private persons in accordance with the trust for the benefit of the public.

Chapter 91 applies to filled as well as flowed tidelands, so that any filled areas, moving inland to the point of the historic high tide line as it existed prior to alteration, are subject to Chapter 91 jurisdiction. However, in order to focus the Department's resources on protecting waterfront lands most important for advancing water-related public interests, these Chapter 91 rules exclude "landlocked" tidelands and only apply to those filled tidelands between the waterway and the first public way, or 250 feet from the water, whichever is farther landward. The one exception to this rule is in areas selected by the Commonwealth as Designated Port Areas, where Chapter 91 covers all filled tidelands within the boundaries of these areas which are critical to the traditional commercial maritime industry.

### **Chapter 91's Basic Provisions**

Anyone proposing to place fill, build structures or dredge in tidelands and other areas subject to Chapter 91 jurisdiction must have a valid Chapter 91 license. Anyone who has a Chapter 91 license who changes the current use or makes structural alterations must also apply for a license. People placing temporary rafts, floats or moorings in the Commonwealth's waterways do not need a Chapter 91 license, but they must have the approval of their local harbormaster.

Anyone seeking a license must submit an application, professional drawings of their proposed activities, and an application fee to the Wetlands and Waterways Division of the Massachusetts Department of Environmental protection. Staff of the division review the application to assure that it meets all the standards for engineering safety, environmental protection, public access, and water dependent activity set out in the Chapter 91 regulations. Following this review and, in the case of non-water dependent projects, following a public hearing and written determination, the Department issues a license subject to fees for tidewater displacement and occupation of state-owned tidelands.

Under the proposed regulations, the basic term of licenses will be 30 years. For some temporary uses, license terms will be shorter; in certain cases the term can extend to 65 years for projects out over the water and to 99 years for projects on filled tidelands.

## Key Features Of the New Regulations

The new regulations contain numerous initiatives designed to enhance the state's stewardship of tidelands and other waterway areas. However, the most important features of the regulations, as they relate to each of the basic program goals, are described below.

1. **Ensuring the Immediate Waterfront is Used Primarily for Water-Dependent Purposes:** The new regulations include provisions to protect existing maritime activities from disruption by projects that are not water-dependent, and to promote the development of new facilities for water-dependent activity on the shoreline.
2. **Providing Public Access for Use and Enjoyment of the Waterfront:** The regulations preserve public rights to walk freely on flowed and filled tidelands along the water's edge for, at a minimum, the purposes of fishing, fowling, and navigation. Furthermore, ample public access benefits will be secured where these lands are used for private, and particularly non-water dependent, development.
3. **Areas of Critical Environmental Concern:** the rules do not allow fill and put increased limits on new structures in designated areas of Critical Environmental Concern.
4. **State Local Partnership:** the rules identify explicitly ways by which a city or town may, through a locally-developed and state approved municipal harbor plan, substitute local zoning requirements appropriate to the community for many of the statewide standards otherwise contained in the rules.
5. **Public Access:** While the rules strongly promote rights of public access along the coast, in particular for the traditional rights of fishing, fowling, and navigation, they now provide explicitly for limiting that access where appropriate to protect public health and safety or private property, and where certain filled tidelands are being used for water-dependent purposes.
6. **Marinas and Yacht Clubs:** The rules explicitly recognize the value of marinas and yacht clubs in providing recreational boating facilities and provide a streamlined licensing process for them along with other water dependent uses. Access requirements have been relaxed for any such facility which essentially serves as a public recreational boating facility, even if it is privately owned.
7. **Slips and Moorings:** The rules require a fair system for assigning marina slips and moorings, but makes it clear that this only applies to slips and moorings as they become vacant; and that is the harbormaster or the marina owner who makes the assignment, not the state.
8. **Terms:** The basic license term is increased to 30 years, and can be, under certain conditions, further increased to 65 years for projects out over the water, and to 99 years for projects on filled tidelands.
9. **Unlicensed Structures:** The rules include an "amnesty" program which allows any unlicensed structure in either water-dependent or non-water dependent use as of January 1, 1984 (when Chapter 91 was amended) to file within three years for a license under the old regulations and old fees. In addition, "single-family" piers may obtain an "interim approval" instead of a license for up to 30 years or the transfer of the property, whichever comes first.
10. **Infrastructure Facilities:** Provisions for infrastructure facilities are tightened to assure that only facilities which cannot be located inland are allowed in flowed tidelands and to assure that for those facilities allowed in flowed tidelands, struct standards will apply.

The inclusion of these improvements, along with the strong principles previously contained in these regulations, will ensure that the Commonwealth's waterfront areas remain productive, environmentally protected and accessible for future generations.



310 CMR: DEPARTMENT OF ENVIRONMENTAL PROTECTION  
**PREFACE TO 1996 WATERWAYS REGULATIONS AMENDMENTS:  
SIMPLIFIED PROCEDURES FOR SMALL DOCKS AND PIERS**

## **Introduction**

As part of the Department of Environmental Protection's ongoing efforts at "more protection, less process," the Waterways Regulation Program is revising its regulations to streamline permitting for small docks, piers, and other structures associated with residences. The goal is to make the process easier and less expensive for applicants seeking approval for small structures placed adjacent to residential property while protecting the public's rights in Massachusetts waterways, including fishing, fowling, navigation and other lawful activities. The Department held public hearings on these amendments during July and August, 1995. In order to incorporate a variety of interests in the development of these regulations, the Department convened an Advisory Committee made up of waterfront homeowners, environmentalists, and sport fisherman, among others.

## **Feature of the Simplified Structures**

The regulations create simplified procedures for obtaining Chapter 91 Waterways authorization for small docks and piers. Unlike the existing amnesty program, these regulations would apply to proposed as well as existing small docks and piers. Based on a survey of Department records of existing licenses, the new procedures would be available to more than three quarters of all residential structures in Massachusetts waterways. Some of the most important features of the simplified procedures are:

- Eliminate costly requirement for professionally prepared plans;
- License remains valid following a sale to a new owner;
- Automatic renewal unless problems reported to Department includes renewal of previously granted amnesty permits;
- Simplify application form, in easy-to-read language, to be completed by homeowners themselves;
- Simplify the regulations, with a short, self-contained section pertaining to only to smaller structures;
- Eliminate tidewater displacement fees for small docks and piers;
- Eliminate occupation fees for projects in enhanced portions of Great Ponds;
- Eliminate requirement for wetlands approval for older, existing structures, at the discretion of local Conservation Commission;
- Provide a definitive list of Great Ponds to be established and updated periodically;
- Establish a cooperative compliance policy regarding docks and piers on Great Ponds;
- Department handles notice to most local officials when Department issues license;
- Local Option available for cities and towns to regulate small docks and piers with Department oversight.

The Department and the Waterways Advisory Committee believe that this streamlining can be accomplished without reducing protection of public rights in waterways. Instead, these regulatory amendments are designed to increase compliance, which will increase protection.

## **Background**

In 1983, the Massachusetts Legislature amended Chapter 91 to increase protection for water-dependent uses on tidelands and Great Ponds. After lengthy public review, new regulations were adopted in 1990. As an incentive to increase compliance on both inland and coastal waterways, the Department offered amnesty for existing unauthorized structures built before the Legislature revised the law. This amnesty contained some less expensive and easier procedures for small-scale structures. In 1993 the Legislature extended the amnesty period for an additional two years. In 1995 amnesty was extended an additional year to 1996.

Through extensive outreach and education efforts, the Department gained valuable knowledge both from public and private users of Massachusetts waterways, including tidelands, rivers and Great Ponds. It learned that while many people were in favor of protecting public rights, it was often too expensive, time consuming and confusing for them to do so. The application forms, regulations, requirements for professional plans and the perceived need for professional assistance from lawyers or consultants discouraged compliance among homeowners.

In response to landowner's concerns and the pending expiration of the amnesty period, an Advisory Committee was formed, with representatives from public and private users, environmentalists, consultants, the legal community and others. The purpose was to examine ways in which the process could be made easier and less expensive while still protecting the rights of the public in waterways. The Advisory Committee's goal was to eliminate the need for any

further extension of the amnesty program by developing a simplified license process for existing as well as new residential docks and piers.

### **What Applicants Must Do**

In order to obtain a license under the proposed Simplified Procedures, a waterfront property owner must fill out a simplified application form. The new process is low cost and way to complete. There is not need to hire consultants. The one-page application form asks only for basic information and a description of the project. Applicants should be able to submit their own plans. Department personnel from the Waterways Program are available to assist applicants. After the applicant sends notice to a local newspaper, the Department will take care of most other notice requirements to local government officials. Once the application has been approved, and one-time fees are paid, the license is valid for 10 years, without further need for review, approval or fees. If a waterfront property owner chooses to renew the license at the end of 10 years, the application fee will cost half as much.

For municipalities that have adopted the local chapter 91 permitting option, applicants will be eligible for a one-year permit if they comply with regulations established at the local level in overall accordance with Department standards. Fees will be set and collected by the municipality, who will also handle enforcement in the first instance. The Department will retain authority over appeals.

### **Public Comment and Promulgation**

Eight public hearings were held during July and August in West Barnstable, Pittsfield, Auburn, Lakeville, Springfield, Boston, Peabody and Woburn. Comments were sought and received both at the public hearings and in writing during the public comment period. There were numerous issues upon which comments were received. Several were serious enough to justify rethinking the approach in the initial draft.

After the public hearings were held and written comment period closed, the Advisory Committee reconvened for several additional meetings during the fall of 1995 to evaluate the comments received and made recommendations based on them. Following a thorough evaluation, a final version of the regulations was drafted by the Department. The four most significant issues were dealt with as follows:

#### **1. LOCAL OPTION**

**Comments:** The local option was supported by many who believed local control would be more effective and fair than state control. It was opposed by some who questioned the potential discrimination against out-of-town users. Questions of quality control, training, and degree of state oversight were raised on both sides.

**Response:** The local option is now presented with a balancing of local and statewide interests. Any municipality may elect local regulatory control, but it must be in accordance with standards set by the Department, which holds statutory responsibility over waterways under M.G.L. c. 91. Either the municipality must follow certain of the substantive requirements of ch. 91 and Department regulations, or it must propose its own rules and demonstrate to the satisfaction of the Department that those rules provide “substantially equivalent” protection of the public’s rights in waterways.

#### **2. ELIGIBILITY**

**Comments:** The size and location of structures which would be eligible for streamline licensing was debated. Some believed a proposed 3-foot restriction on water depth was too inflexible to allow for individual circumstances. There was also discussion regarding appropriate size requirements for eligible structures, with a wide range of proposed square footage.

**Response:** A more flexible approach to design has been used successfully by the Department in the past, taking into account individuals site conditions. While following the substantive guidelines for navigation set out in 310 CMR 9.00, an applicant will not be unreasonably held to arbitrary depth standards. Overall size has been established at less than 600 square feet for structures built before 1984 and less than 300 square feet for post 1984 structures.

### 3. COSTS

**Comments:** Some felt that the fee requirements were still too high, even under the proposed regulations; although those who had complied under the present licensing procedures questioned the fairness of an inexpensive process for those out of compliance. Elimination of the requirement for stamped plans represented a large reduction in cost which was largely supported by prospective applicants, although reservations were expressed by some consultants and regulators (see below).

**Response:** The application fee has been reduced from \$100 to \$50 and the renewal fee from \$50 to \$25. Professional plans are mostly eliminated under c.91 for small structures, but may still be required in rare circumstances (see below). Fees under the local option may be set locally, and will be used for the improvement of waterways that will benefit all the public. Although those already in compliance under existing regulations may pay lower fees and simpler procedures are unfair to them, the Department does not believe this is an excuse for failing to improve regulatory procedures and reduce the costs of compliance whenever possible.

### 4. PLANS

**Comments:** Most people commenting welcomed the reduction in cost which would occur from the elimination of professional plan requirements, but some consultants and conservation commissions were concerned that quality control would be a problem. Boundary issues and real estate title requirements were concerns, as well as potential inconsistencies with requirements under the Wetlands Protection Act.

**Response:** The final version of the regulations do not require professional plans in most instances. They may be required for some applicants under the simplified rules, but only in rare circumstances where the Department finds they are necessary. This is expected to only happen where there is a serious question relating to boundaries, navigation, public access, or structural integrity, or where the plans are otherwise required by the Conservation Commission under the Wetlands Protection Act.

#### Membership Advisory Committee

Individuals from the following organizations were members of the 1995 Waterways Advisory Committee. The Committee was chaired by Carl Dierker, Assistant Commissioner of DEP

Boston Bar Association  
 Concerned Coastal Sportsmen's Association  
 Congress of Lakes and Ponds Association  
 Conservation Law Foundation  
 Daylor Consulting Group, Inc.  
 MA Association of Conservation Commissions (MACC)  
 MA B.A.S.S. Federation  
 MA Harbormasters Association  
 MA Dept. of Environmental Management, Public Access Board  
 MA Dept. of Fisheries, Wildlife & Environmental Law Enforcement  
 MA Office Coastal Zone Management  
 MA Representative Michael P. Cahill  
 MA Representative Douglas W. Petersen  
 MA Sportsmen's Council



